TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 197.

FREDERICK BAUSMAN, AS RECEIVER OF THE RAINIER POWER AND RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL DIXON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED NOVEMBER 22, 1907.

(16,725.)

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(16,725.)

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1 FREDERICK BAUSMAN, as Receiver of the Rainier Power and Railway Co., Plaintiff in Error,
v.
SAMUEL DIXON, Defendant in Error.

Appeal from the supreme court of the State of Washington to the Supreme Court of the United States.

William E. Humphrey, John E. Humphries, E. P. Edsen, and Remsberg & Atkinson, attorneys for defendant in error.
Bausman, Kelleher & Emory, attorneys for plaintiff in error.

2 No. 2581. Filed Apr. 27, 1897. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

3 SAMUEL DIXON, Plaintiff, Respondent,
v.
FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Company, Defendant, Appellant. } No. 22200.

Appeal from the superior court of King county to the supreme court of the State of Washington.

4 In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver of the Rainier Power & Railway Co., Defendant. } No. —. Complaint.

Plaintiff complains of the above-named defendant, and for cause of action alleges:

1.

That all the times herein mentioned and for a long time before and since the Rainier Power & Railway Company was and is a corporation duly and legally organized under the laws of the State of Washington and was, prior to the 13th day of June, 1893, engaged in running, operating, and controlling a certain street railway in the city of Seattle, King county, Washington.

2.

That on the 13th day of June, 1893, M. F. Backus was duly appointed by the United States circuit court for the district of Washington, northern division, receiver of the Rainier Power & Railway Company and qualified and served as such receiver under said appointment until the 11th day of February, 1895.

3.

That on the 11th day of February, 1895, the said Backus ceased to be receiver of the said railroad company, its property, rights,

franchises, and interests, and the defendant, Fred Bausman, was duly and regularly appointed by the United States circuit court for the district of Washington, northern division, receiver of the said corporation, its rights, franchises, and interests, and ever since said time has been and now is the duly appointed, qualified, and acting receiver of said corporation.

4.

That prior to the 13th day of June, 1893, the plaintiff was regularly employed as electrician by the said Rainier Power & Railway Co., which employment embraced the taking care of the electric cars and to do the car-repairing and the electric part of the car-work.

5.

That during said employment of plaintiff, at the request of the said corporation, the plaintiff was required to assist in doing line work upon the said road.

6.

That on the said 13th day of June, 1893, when the said Backus was appointed receiver of the said road, he took charge and control of the said road and was the duly qualified and acting receiver of the said road, as aforesaid, and continued to keep the plaintiff in the same position that he had been for the Rainier Power & Railway Co., and plaintiff so continued to work until the 15th day of June, 1893.

7.

That prior to the 13th day of June, 1893, the said Ra-nier Power & Railway Co. had purchased certain wire to be used upon the line of said road near the corner of Depot and Stewart streets, in the city of Seattle, and said wire was so used and placed upon the road; that the said wire so purchased and used at said point was of poor quality, was rotten, was unsafe, and had a kink in the same, which had been pounded out instead of being cut and spliced, all of which was well known to said Rainier Power & Railway Company.

8.

That said Rainier Power & Railway Co. negligently caused said rotten wire to be placed along the said line of road and negligently placed said wire which had been kinked and pounded out, and, by reason of said wire being rotten and of inferior quality, it was dangerous and unsafe to the person employed in taking care of the said road, which was well known to the said Rainier Power & Railway Company.

9.

That on the 13th day of June, 1893, the said M. F. Backus, as receiver of the said Rainier Power & Railway Co., kept in his employ the same officers and the same servants who had been employed by the said Rainier Power & Railway Co., and the said

officers and vice-principals, so kept by the receiver, knew of the said defective wire and knew of the kink being pounded out and knew that said wire was unsafe and in a dangerous condition.

10.

That in addition to the said wire being rotten and the said kink having been pounded out, instead of said wire having been cut and spliced, the said company negligently allowed the said wire to be taken down to allow a house to be moved over it, and negligently placed the same wire back in the same condition, it being well known by the said railroad company that after said wire was taken down it could not be replaced in a safe condition, and it being well known to the said railroad company that where a trolley wire has been once stretched and loosened at a curve it could never be replaced as it had been, and well knew that the same is generally considered unsafe if it is once loosenes at a curve.

11.

That after the said Backus took possession of the said property of the said Rainier Power & Railway Co. he negligently continued to run and operate the same without replacing said wire or repairing the same in any manner whatever, and negligently suffered and permitted the rotten and defective wire to remain in place and to be used.

12.

That on the 15th day of June, 1893, this plaintiff was ordered by D. Thomas Denny, manager, to go to the corner of Depot and Stewart streets, in the city of Seattle, to repair a broken ear where the said trolley wire was fastened, and this plaintiff un-
7 soldered the said ear from the wire and replaced it with a new ear.

13.

That in order to draw the trolley wire back over the curve of the tract in proper position it was necessary for the plaintiff to use block and tackles, which the plaintiff then and there attempted to use.

14.

That plaintiff was wholly unaware at the said time that the said trolley wire was unsafe, rotten, and unsound, and that instead of cutting and splicing the trolley wire at the point where the said kink was that the said kink had been pounded out, and was wholly unaware that the said trolley wire had been taken down at the said point to allow a house to be moved over it.

15.

That while the plaintiff was in the act of using the block and tackles to draw the trolley wire back over the curve of the track in a proper position, which it was necessary then and there to do, he

was situated in the proper place on the outside of the curve of the trolley wire at a point where the span wire connected with the trolley wire on the left side of the span wire and block and tackle and to right of trolley on outside of curve, and as he tightened the said trolley wire the said rotten and defective trolley wire broke and the plaintiff was caught in the angle of the trolley wire and span wire and was thrown off the box and platform where it was necessary for him to stand to repair the said broken ear and to replace the said trolley wire.

16.

The plaintiff was thrown to the ground, a distance of about 15 feet, and was thrown onto his back, his back striking upon the track, and he received injuries to his back, body, spine, and limbs, which have caused him to be confined to his bed and home
8 ever since, and he is permanently injured and paralyzed.

17.

That prior to said injury this plaintiff was capable of earning and did earn and was earning at the time of receiving these injuries the sum of $3.50 per day; was of sound body and mind and of the age of 35 years.

18.

That on account of said injuries this plaintiff has lost his time from the 15th day of June, 1893, and has not been able to work at anything whatever or earn any money or other thing of value.

19.

That on account of the said injuries he has required the care of a nurse and has been put to other expenses of doctors' bills and expenses on account of the said injuries, amounting to the sum of one thousand dollars; that he has suffered great pain of body and mind, and is damaged on account of the said injuries, in general damages, in the sum of twenty-five thousand dollars.

20.

That the said general damages and special damages are due to him from the defendant and are wholly unpaid.

Wherefore plaintiff demands judgment against the defendant for the sum of twenty-six thousand ($26,000.00) dollars for his costs and for all other and proper relief.

JOHN E. HUMPHRIES,
REMSBERG & ATKINSON, AND
E. P. EDSEN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of King, }

Samuel P. Dixon, being first duly sworn, upon oath says
9 that he is the plaintiff named in the above-entitled action;

that he has heard the foregoing complaint read, knows the contents thereof, and that he believes the same to be true.

SAMUEL P. DIXON.

Subscribed and sworn to before me this 18 day of March, A. D. 1896.

C. E. REMSBERG,
Notary Public in and for Washington, Residing at Seattle.

Filed Jun- 4, 1896.
T. W. GORDON, *Clerk.*

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver of the Rainier Power & Railway Company, Defendant.
No. —. Answer.

Comes now the above-named defendant, Frederick Bausman, as receiver of the Rainier Power & Railway Company, by his attorneys, Bausman, Kelleher & Emory, and answers the complaint of the plaintiff herein as follows:

I.

Answering paragraph 4 of said complaint, said defendant denies each and every allegation therein contained.

II.

Answering paragraph 5 of said complaint, said defendant denies each and every allegation therein contained.

III.

Answering paragraph 6 of said complaint, said defendant denies each and every allegation therein contained, except that on June 13th, 1893, said Backus, as receiver, took charge and control of said road.

IV.

Answering paragraph 7 of said complaint, said defendant denies each and every allegation therein contained except the allegation that prior to June 13th, 1893, said Rainier Power & Railway Company had purchased certain wire to be used upon said road near the corner of Depot and Stewart streets, in the city of Seattle, and that said wire was so used and placed upon said road.

V.

Answering paragraph 8 of said complaint, said defendant denies each and every allegation therein contained.

VI.

Answering paragraph 9 of said complaint, said defendant denies each and every allegation therein contained.

VII.

Answering paragraph 10 of said complaint, said defendant denies each and every allegation therein contained.

VIII.

Answering paragraph 11 of said complaint, said defendant denies each and every allegation therein contained.

IX.

Answering paragraph 12 of said complaint, said defendant denies that he has any knowledge or information sufficient to form a belief as to each and every allegation therein contained.

X.

Answering paragraph 13 of said complaint, said defendant denies each and every allegation therein contained.

XI.

Answering paragraph 14 of said complaint, said defendant denies each and every allegation therein contained.

11 XII.

Answering paragraph 15 of said complaint, said defendant denies each and every allegation therein contained except the allegation that said plaintiff was caught in the angle of said trolley wire and span wire and was thrown off the box and platform.

XIII.

Answering paragraph 16 of said complaint, said defendant denies that he has any knowledge or information sufficient to form a belief as to each and every allegation therein contained except the allegation that said plaintiff was thrown to the ground and received injuries.

XIV.

Answering paragraph 18 of said complaint, said defendant denies that he has any knowledge or information sufficient to form a belief as to each and every allegation in said paragraph contained.

XV.

Answering paragraph 19 of said complaint, said defendant denies that he has any knowledge or information sufficient to constitute a belief as to each and every allegation in said paragraph contained.

XVI.

Answering paragraph 20, said defendant denies each and every allegation therein contained.

And for a first affirmative defense to said complaint said defendant alleges as follows:

That the injuries received by said plaintiff and complained of in said complaint were caused wholly by the careless and negligent conduct of the said plaintiff at the time of his receiving said injury and prior thereto.

And for a second affirmative defense said defendant alleges as follows:

12 That the injuries received by said plaintiff and complained of in said complaint were caused wholly by risks incident to the employment of the said plaintiff, and which said plaintiff voluntarily assumed, and that the said plaintiff knew, or ought to have known, of all defects existing in any of the appliances with which he was engaged or working in the course of his employment at the time he received said injuries.

And for a third affirmative defense the said defendant alleges:

That the said injuries to said plaintiff complained of in said complaint were caused by the negligence and careless performance of their duties by employees and servants of said Rainier Power & Railway Company other than said plaintiff.

Wherefore said defendant prays that said action be dismissed, and that said defendant recover his costs and disbursements herein.

BAUSMAN, KELLEHER & EMORY,
Attorneys for Defendant.

Due service of within answer this 10 day of July, 1896, duly admitted.

JOHN E. HUMPHRIES &
E. P. EDSEN,
Attorneys for Pl'ff.

STATE OF WASHINGTON, } *ss:*
County of King, }

Fred Bausman, being first duly sworn, on oath says that he is the defendant named in the foregoing answer; that he has heard the same read, knows the contents thereof, and believes the same to be true.

FRED BAUSMAN.

Subscribed and sworn to before me this 10 day of July, 1896.

DANIEL KELLEHER,
Notary Public in and for the State of Washington, Residing at Seattle.

Filed Feb. 8, 1897.
GEO. M. HOLLOWAY, *Clerk.*

13 In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
v.
FRED BAUSMAN, Receiver of the Rainier Power & Railway Company, Defendant. } No. —. Reply.

Comes now the plaintiff and for reply to the answer of defendant herein—

Denies each and every allegation contained in the 1st, 2nd, and third affirmative defenses and each of them.

Wherefore plaintiff prays as heretofore.

JOHN E. HUMPHRIES &
E. P. EDSEN,
REMSBERG & ATKINSON,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } *ss:*
County of King, }

Samuel Dixon, being first duly sworn, upon oath says that he is the plaintiff named in the above-entitled action; that he has heard the foregoing reply read, knows the contents thereof, and that he believes the same to be true.

SAMUEL DIXON.

Subscribed and sworn to before me this 15th day of July, A. D. 1896.

C. E. REMSBERG,
Notary Public in and for Washington, Residing at Seattle.

We, the undersigned attorneys for the plaintiff in the above-entitled cause, do hereby certify that the above and foregoing complaint and summons are true and correct copies of the original complaint and summons in said cause.

THOMPSON, EDSEN & HUMPHRIES,
Attorneys for Plaintiff.

Filed July 16, 1896.
H. H. SMITH, *Deputy Clerk.*

14 In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver, Defendant. } No. —. Bill of Particulars.

Comes now the plaintiff herein and, in compliance with the demand of defendant herein, furnishes the following, his bill of particulars of the claim for special damages in this action, to wit:

Drs. Sharpless & Coe	$200
Dr. Dawson	8.00
Dr. Shannon	2.50
Dr. Jordan	25

Dr. Brooks	35
Dr. Patterson	152
Providence hospital	113
Medicines	53.95
Nurses.	
Mrs. Boise	5
Mrs. Brown	50
Mrs. Ellsworth	3
Hired help.	
Mrs. Gaunt	15
" " 3 weeks' board at $4	12
Lena Young, services	21
" " 7 weeks' board at $4	28
Alice Raidle, services	2.50
5 days' board	3
Hattie Kiger, services	3
3 weeks' board at $4	12
Minnie McDowell, services, 4 weeks	16
Washing	28.90
Moving, May 9, 1894	15
" Sept. 20, 1894	15
Barber	11.50
Ed. Lowman	40
" " 7 weeks' board at $4	28
Wm. Collicott	21
Belote Bro	25
Burrows	20
" 3 weeks' board at $4	12
Chairs	15
Air mattress	15.00
Total	$1,006.35

JOHN E. HUMPHRIES,
E. P. EDSEN, AND
REMSBERG & ATKINSON,
Attorneys for Plaintiff.

15 STATE OF WASHINGTON, } ss:
County of King, }

Samuel P. Dixon, being first duly sworn, upon oath says that he is the plaintiff named in the above-entitled action; that he has heard the foregoing bill of particulars read, knows the contents thereof, and that he believes the same to be true.

SAMUEL P. DIXON.

Subscribed and sworn to before me this 22 day of April, A. D. 1896.

C. E. REMSBERG,
Notary Public in and for Washington, Residing at Seattle.

We hereby acknowledge service of the foregoing bill of particulars and the receipt of a true copy thereof this 22nd day of April, 1896.

BAUSMAN, KELLEHER & EMORY,
Attorneys for —.

Filed Jun- 4, 1896.
T. W. GORDON, *Clerk.*

In the Superior Court of the State of Washington for the County of King.

SATURDAY, 13*th June*, 1896.

SAMUEL DIXON
vs.
FRED BAUSMAN, Rec'r. } 22200.

Dem. to complaint overruled.

T. J. HUMES, *Judge.*

80–460.

16 In the Superior Court of the State of Washington for the County of King.

WEDNESDAY, *September 9th*, 1896.

SAMUEL DIXON
vs.
FRED BAUSMAN, as Receiver. } 22200. Stricken.

And now this cause is by agreement stricken from the notes for trial.
85–214.

In the Superior Court of the State of Washington for the County of King.

SATURDAY, *January 16th*, 1897.

SAMUEL DIXON
vs.
FRED BAUSMAN, Receiver. } 22200.

Cause set for trial for February 8th, 1897.
87–44.

In the Superior Court of the State of Washington for the County of King.

MONDAY, *February 8th*, 1897.

SAMUEL DIXON
vs.
FREDERICK BAUSMAN. } 22200.

This cause is transferred to the criminal department of this court.
87–122.

17 In the Superior Court of the State of Washington for the County of King.

MONDAY, *February 8th*, 1897.

SAMUEL DIXON
vs.
FRED BAUSMAN, as Receiver of the Rainier Power and Railway Company. } 22200.

At the hour of 4.30 o'clock p. m. this cause comes on regularly for trial, the parties appearing in person and by counsel. The following-named jurors are called, sworn, and examined as to their qualifications to act as jurors in this cause: Wm. McMullen, R. C. Gessner, A. J. Taylor, J. H. Monson, John Shea, Frank North, J. W. Thornton, L. W. Foss, Geo. C. Bartlett, J. W. Perkins, Geo. Newell, and S. J. Robertson, all of whom are passed for cause by the plaintiff and the defendant. The plaintiff exercises the peremptory challenge against the said Geo. Newell and John Booth, a juror, who was sworn and examined as to his qualifications to act in this cause, after Juror Newell had been so challenged and excused. The defendant exercises one peremptory challenge against Juror N. O'Brien.

O. JACOBS, *Judge*.

In the Superior Court of the State of Washington for the County of King.

TUESDAY, *February 9th*, 1897.

SAMUEL DIXON
vs.
FRED BAUSMAN, Receiver of the Rainier Power and Railway Co. } 22200.

18 This cause is called for trial at 9.30 o'clock a. m., pursuant to continuance of the same from yesterday, the 8th day of February, 1897. The parties and counsel are present in court. Jurors are called, sworn, and examined as to their qualifications to act as jurors in this cause. The defendant peremptorily challenges one juror, S. J. Robertson. The jury finally empaneled and sworn to try the cause as follows: Wm. McMullen, John Shea, Geo. C. Bartlett, R. C. Gessner, A. J. Taylor, J. H. Munson, Frank North, J. W. Thornton, L. W. Foss, J. W. Perkins, Wm. Phillips, L. P. Patchen. Witnesses are sworn and examined for the plaintiff, who also introduces certain documentary evidence, marked as Plaintiff's Exhibits A, B, & C. The defendant moves the court for judgment of nonsuit, which motion the court denies; to which ruling of the court the defendant excepts, and the exception is allowed. Witnesses for the defendant are sworn and examined. The deposition and testimony of Geo. B. Stocks is filed and read as evidence. The stipulation of the parties as to the testimony of Geo. Newell and George B.

Stocks is filed. The trial of this cause is continued until 9.30 o'clock a. m., Wednesday, Feb'y 10th, 1897.

O. JACOBS, *Judge.*

89-337.

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver, Defendant.

Plaintiff asks that the court charge the jury in writing and give each of the following instructions:

1.

It is the duty of persons or corporations operating street-car lines to use ordinary care and prudence to see that the places
19 where the employees are working, the machinery, appliances, and appurtenances, are in good order and condition and not defective, and for the purpose of keeping the road, appliances, wires, and tracks in a safe condition it is the duty of the person or company operating the road to inspect the road, appliances, wires, and tracks where the employees are expected to work, and repair any defects in the same.

2.

If you find from the testimony that when the line of the defendant's road was constructed around and near the corner of Depot and Stewart streets, in the city of Seattle, Washington, that small ears were put upon the wires, and that by reason of such small ears being put upon the wire kinks were made at the end of the ears in the wire, and afterwards the same ears were removed and curved ears placed upon the trolley wire instead of the small ears; that the kinks in the wire were negligently pounded out and the wire was negligently left in an unsafe and weak condition and subject to break, and that the company, with full knowledge of such weak and unsafe condition, negligently continued to use the same; that when the receiver, M. F. Backus, was appointed he kept in his employ, until the happening of the injury to the plaintiff, the same manager and superintendent that was employed by the company, and the manager and superintendent and company knew of the wire being unsafe and in a weak and dangerous condition, and you find that plaintiff was employed as a workman and car-repairer for the company and continued in such employment after the receiver was appointed, and while employed by the company did special work upon the line when directed by the manager and superintendent, and that he was not a superintendent and had no power or authority to inspect the line and was not employed for that purpose, and that by the order and direction of the officers and manager in charge he was sent to the corner of Depot and Stewart streets to fasten
20 the span wire to the trolley wire, and that he had no knowledge of any defect in the trolley wire; that while drawing

the span wire and the trolley wire together the trolley wire broke where the same had been negligently left in a weak and unsafe condition and where the kink had been negligently pounded out, and plaintiff was thrown to the ground and injured, and you find that his injury was caused by the fault and negligence of the receiver and without any fault or negligence on his part, then he will be entitled to recover the actual damage sustained.

3.

Should you find for the plaintiff, then in measuring the damages, if any, he has sustained you may take into consideration the reasonable value of his time lost, if any, consequent upon his injuries; the necessary sums of money, if any, expended for medical attendance, nursing, and medicines rendered necessary by his injuries; the physical pain and suffering, me-tal agony, and distress of mind, if any, consequent upon his injuries received, and if you believe from the evidence that plaintiff's injuries, if any, are permanent and will disable him to labor and earn money in the future, then you may, in addition to the above, find such other sum as will be a fair compensation for his future diminished capacity to earn money.

Filed Feb. 10, 1897.

GEO. M. HOLLOWAY, *Clerk.*

1. I instruct you, gentlemen, as matter of law, that even if you shall find that Samuel Dixon was up to the time of the appointment of the receiver in the employ of the Rainier Power & Railway Company, that such circumstances alone would not make plaintiff Dixon the employee of the receiver when the latter took charge of the road, unless you shall also find that the receiver upon taking charge or afterwards, before plaintiff Dixon's injuries, employed or caused him to be employed for the receiver, or unless the re-
21 ceiver, having had a reasonable time in which to remove or change the employees, had made no changes in the former employees after such reasonable opportunity. If you shall find, therefore, that the receiver did not employ Dixon or cause him to be employed before his injuries and did not have a reasonable opportunity in which to make changes in the employees of the company, then plaintiff Dixon cannot recover.

2. I instruct you, gentlemen, as matter of law, that when Samuel Dixon entered the employment of the receiver, if you shall find that he did enter the receiver's employment, he assumed all the risks which are ordinarily connected with the kind of occupation for which he was employed.

3. I instruct you, gentlemen, as matter of law, that if it was a part of the ordinary duties of Samuel Dixon in the employ of the receiver, if you shall find that he was in the receiver's employment, to do work in repairing the railroad's trolley wires and span wires, then plaintiff Dixon assumed all the risks which are ordinarily connected with the work of repairing trolley wires or span wires, and for any injury resulting from such risks he cannot recover.

4. I instruct you, gentlemen, as matter of law, that it makes no

difference by what name plaintiff Dixon's employment may have been called, provided it was one of his duties to do repair work upon the railroad's trolley wire and span wire, and in repairing such trolley wire or span wire he assumed all the risks which are ordinarily connected with such repair work, if it was a part of his ordinary duties, no matter by what name his employment may have been called.

5. I instruct you, gentlemen, as matter of law, that if you shall find that plaintiff Dixon, as one of his ordinary duties in the employment of the receiver, had to do repair work on the railroad's trolley wires and span wires, then he assumed all the risks arising from any accidents that might befall him in the performance
22 of such duties arising from causes which the receiver could not reasonably foresee and against which no reasonable industry on the receiver's part could protect him.

6. I instruct you, gentlemen, as matter of law, that if plaintiff Dixon was at any time in the employ of the receiver, the receiver was not an insurer of his safety, and that the receiver discharged his duty towards plaintiff Dixon's safety in this particular matter if the trolley wires and span wires which plaintiff Dixon was to repair at this particular point were reasonably adapted to the work which plaintiff Dixon should have to use them for.

7. I instruct you, gentlemen, as matter of law, that it was the duty of plaintiff Dixon, if he were in the employment of the receiver, to advise the receiver or plaintiff Dixon's own superior officers of any defects in the trolley wire, and if you shall find that plaintiff Dixon knew of any such defects or by reasonable industry could know of such defects on the curve at Depot and Stewart streets, and if plaintiff Dixon then failed to make such defects known as aforesaid, then plaintiff Dixon cannot recover in this case.

8. I instruct you, gentlemen, as matter of law, that if you shall find that plaintiff Dixon was at the time he received his injuries in the employment of the receiver, and knew or could have known by ordinary vigilance of any defects in the trolley wire upon which he was at work, exposing him to risk in placing a strain upon it, then plaintiff Dixon, in placing a strain upon it under such circumstances, assumed all the risks of such strain, and cannot recover.

9. I instruct you, gentlemen, as matter of law, that it is the duty of an employee to use all reasonable means of avoiding harm to himself in his employment, and if he fails to see a defect which with reasonable vigilance he ought to see and is injured on account of it, he cannot recover.

10. I instruct you, gentlemen, as matter of law, that in de-
23 termining whether plaintiff Dixon was aware of any defects, if there were defects, in the trolley wire at the place at which he was injured, it is not necessary that you have before you testimony that he actually did see such defects, if you shall also find that plaintiff Dixon had had reasonable opportunities, either before or at the time of the accident, to perceive such defects.

11. I instruct you, gentlemen, that the law will not permit an

employee to expose himself unnecessarily to danger; and if you shall find that plaintiff Dixon could have stood in a safer position than that in which he was injured while doing his work, then plaintiff Dixon cannot recover.

12. I instruct you, gentlemen, as matter of law, that if you shall find that the business of repairing trolley or span wires is a dangerous occupation, then plaintiff Dixon assumed all risk of a dangerous occupation.

13. I instruct you to return a verdict in favor of defendant.

(Endorsed:) No. 22200. In the superior court of King county, State of Washington. Samuel Dixon, plaintiff, *vs.* Fred Bausman, receiver, defendant. Defendant's proposed instructions. Filed Feb. 10, 1897. Geo. M. Holloway, clerk.

In the Superior Court of the State of Washington for the County of King.

WEDNESDAY, *February 10th*, 1897.

SAMUEL DIXON
vs.
FRED BAUSMAN, Receiver of the Rainier Power & Railway Company. } 22200.

At the hour of 9.30 o'clock a. m. the trial of this cause is called pursuant to continuance of the same from yesterday, February 9th, 1897. The parties, their counsel, and the jury are all present in court. Witnesses for the defendant are sworn and examined, and documentary evidence is introduced and filed by the defendant and is marked as Defendant's Exhibit No. 1. Witness for the plaintiff is sworn and examined in rebuttal. After counsel addressed the jury, the court instructed them, and at 3.30 o'clock p. m. the jury retire for deliberation, in charge of a sworn officer, A. C. Nelson. The parties agreeing thereto, the court at 5 o'clock p. m. orders the jury brought into court, and, upon the coming into court, the jury are instructed to bring in a sealed verdict, to be left in charge of their foreman, and to report for duty at 9.30 o'clock a. m. tomorrow, February 11th, 1897.

24

O. JACOBS, *Judge*.

89-340.

In the Superior Court of the State of Washington for the County of King.

THURSDAY, *February 11th*, 1897.

SAMUEL DIXON
vs.
FRED BAUSMAN, Receiver of the Rainier Power & Railway Company. } 22200.

This cause is called regularly pursuant to continuance of same from yesterday, February 10th, 1897. The parties are represented

by counsel. At 9.30 o'clock a. m. the jurors answer to the call of their names and are all present, and by their foreman the jury present the following sealed verdict, to wit:

"Samuel Dixon, plaintiff, *vs.* Fred Bausman, receiver of the Rainier Power and Railway Company, defendant.—We, the jury in the above-entitled cause, do find for the plaintiff and assess his damages at the sum of ten thousand dollars ($10,000).

R. C. GESSNER, *Foreman.*"

25 The court asks the jury if the verdict as presented and read is their verdict, and one of their number replied it to be the verdict of eleven jurors. The verdict is filed and the jury excused.

O. JACOBS, *Judge.*

89–342.

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver of the Rainier Power and Railway Company, Defendants. } No. 22200. Verdict.

We, the jury in the above-entitled cause, do find for the plaintiff and assess his damages at the sum of ten thousand dollars ($10,000).

R. C. GESSNER, *Foreman.*

Filed Feb. 11, 1897.
GEO. M. HOLLOWAY, *Clerk.*

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver, Defendant. } No. 22200. Interrogatories.

Plaintiff asks that in case the jury agree upon a general verdict that they answer the following interrogatories:

1. Was the plaintiff injured on the 15th day of June, 1893, while in the employ of the receiver of the Rainier Power & Railway Company, on the Third Street line, at or near the corner of Depot & Stewart streets, in the city of Seattle, Washington, by reason of the trolley wire breaking?

Yes. R. C. Gessner, foreman.

26 2. Was the said trolley wire put up at or near the corner of Depot and Stewart streets, in said city of Seattle, in the year 1892 or about that time?

Yes. R. C. Gessner, foreman.

3. When the trolley wire was so put up at said Depot and Stewart streets were ears put upon the wire for No. "O" wire when they should have been for No. "4" wire, and were there kinks in the

wire at several places, one kink particularly at the church near the corner of Depot and Stewart streets?

Yes. R. C. Gessner, foreman.

4. If there was a kink in the wire at said street corner, was the said kink pounded out?

Yes. R. C. Gessner, foreman.

5. Were the short ears first put on the wire at the corner of Depot and Stewart streets taken off, the kinks pounded out, and curve ears placed upon said wire?

Yes. R. C. Gessner, foreman.

6. Did the pounding out the kink in the wire weaken the wire and make it dangerous and unsafe?

Yes. R. C. Gessner, foreman.

7. Was the wire with the kink pounded out used continuously from the time the curve ears were placed upon the same until after June 15th, 1893?

Yes. R. C. Gessner, foreman.

8. At the time the plaintiff was injured, did the trolley wire break at a point where one of the kinks had been pounded out?

Yes. R. C. Gessner, foreman.

9. Does the pounding out of a short kink in a trolley wire make it subject to be broken easily?

Yes. R. C. Gessner, foreman.

10. Was D. Thomas Denny manager of said Rainier Power & Railway Company until after the plaintiff was injured from the time the road was accepted by the company and ready for use?

Yes. R. C. Gessner, foreman.

27 11. Was J. M. Wolfe the superintendent of the construction and putting up of the trolley wire on the 3rd Street line at the time the same was constructed and when the short ears were removed and curve ears placed upon the line?

Yes. R. C. Gessner, foreman.

12. After and about the time of the acceptance of the road from the contractors, in 1892, was the said Wolfe employed by the Rainier Power & R'y Co. as superintendent of its wires, and did said Wolfe continue as such superintendent until in the year 1893?

Yes. R. C. Gessner, foreman.

13. Did the said Wolfe, as superintendent of wires, have knowledge that there were kinks in the wire, and that the kinks were pounded out at the time the curve ears were placed upon the wire?

Yes. R. C. Gessner, foreman.

14. After M. F. Backus was appointed receiver of said road, on the 13th day of June, 1893, did he keep in charge of the road the same officers and servants who had been employed by the Rainier Power & R'y Co. until after the plaintiff was injured?

Yes. R. C. Gessner, foreman.

15. Was the Rainier Power & Railway Co. a corporation organized under the laws of the State of Washington and during the year 1893 engaged in operating and controlling a street railroad in the city of Seattle, Washington?

Yes. R. C. Gessner, foreman.

16. Did M. F. Backus serve as receiver of the Rainier Power & R'y Co. from June 13th, 1893, to Feb. 11, 1895?

Yes. R. C. Gessner, foreman.

17. Has defendant been the receiver of the Rainier Power & Railway Co. from Feb. 11th, 1895, continuously?

Yes. R. C. Gessner, foreman.

28 18. Was plaintiff employed as a workman for the Rainier Power & R'y Co. from the time it took possession of the line of said road?

Yes. R. C. Gessner, foreman.

19. Did the plaintiff continue as an employee from the time he commenced until June 15th, 1893?

Yes. R. C. Gessner, foreman.

20. Was plaintiff hired and employed for the purpose of taking care of the cars and to do the car-repairing and the electric part of the car-work?

Yes. R. C. Gessner, foreman.

21. Did the management order and direct the plaintiff at times, as laborer and workman, to go out and repair places in the line when it was out of order?

Yes. R. C. Gessner, foreman.

22. Was the plaintiff ordered to go out and fasten the span wire to the trolley wire at a point near Depot and Stewart streets, in the city of Seattle, Washington, on June 15th, 1893, where the span wire had broken loose from the trolley wire?

Yes. R. C. Gessner, foreman.

23. Was it in drawing up the trolley wire to fasten the span wire to it that the break in the trolley wire occurred?

Yes. R. C. Gessner, foreman.

24. Was the plaintiff caught between the trolley wire and the span wire when the trolley wire broke and thrown to the ground?

Yes. R. C. Gessner, foreman.

25. What wages per day was the plaintiff capable of earning before his injury?

$3.50 per day. R. C. Gessner, foreman.

26. Is the plaintiff permanently injured, and has he lost the use of both legs by the injury?

Yes. R. C. Gessner, foreman.

27. Was it on the account of the injury received on June 15th, 1893, at the time the trolley wire broke, that has caused him to lose the use of his legs?

Yes. R. C. Gessner, foreman.

29 28. What amount of damages has the plaintiff sustained by reason of the injuries received?

The sum of ten thousand dollars. R. C. Gessner, foreman.

29. Did the plaintiff exercise ordinary care and prudence at the time of fixing the span wire to the trolley wire, when he was injured?

Yes. R. C. Gessner, foreman.

30. Did plaintiff have any knowledge at the time of the injury

that the trolley wire at the place where it broke was in a dangerous and unsafe condition?

No. R. C. Gessner, foreman.

31. Could the officers and managers of the Rainier Power & R'y Co., by the use of the highest degree of care, skill, and diligence in the construction and inspection of its wires which would be exercised by a reasonable, prudent, and cautious man, under similar circumstances, have discovered that the trolley wire at the corner of Depot and Stewart streets, where plaintiff was injured, had kinks pounded out and was unsafe?

Yes. R. C. Gessner, foreman.

32. Did the manager and superintendent of wires on said road negligently allow the defective and dangerous wire, which was unsafe, to remain at the place where plaintiff was injured until plaintiff was injured?

Yes. R. C. Gessner, foreman.

33. Did the company and the receiver fail to exercise ordinary care and prudence in construction, inspection, and continuation of the use of the defective wire, if any, at the place where the plaintiff was injured?

Yes. R. C. Gessner, foreman.

Filed Feb. 11, 1897.
GEO. M. HOLLOWAY, *Clerk.*

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff, *vs.* FRED BAUSMAN, Receiver, Defendant. } No. 22200. Special Findings by the Jury.

30 We, the jury in the above-entitled cause, do state in writing as follows our answers to the following particular questions of fact upon which we have been instructed by the court to make written findings:

1. Was plaintiff Dixon ever employed by receiver Backus or by any one acting for him?

Yes. R. C. Gessner, foreman.

2. Was it a part of the duties of plaintiff Dixon, in the employment of the railway company or its receiver at the time of his injuries, to do work repairing the trolley wire or span wires along the line of the railway?

No. R. C. Gessner, foreman.

3. Was the business of keeping the trolley and span wires in repair on this line of railway intrusted to Dixon by his employer up to the time of his injuries?

No. R. C. Gessner, foreman.

4. Was plaintiff Dixon specially ordered or requested to do the particular repairing at Depot and Stewart streets, where he received his injuries.

Yes. R. C. Gessner, foreman.

5. If so specially ordered or requested, by whom?

Yes; D. Thomas Denny. R. C. Gessner.

6. Did plaintiff Dixon examine the condition of the trolley wire before applying a strain to it through his block and tackle at the time of his receiving his injuries?

No. R. C. Gessner.

7. If there had been any pounded-out kinks in the trolley wire at Depot and Stewart streets, where plaintiff Dixon was engaged in work upon it at the time of receiving his injuries, could he have perceived such kinks by ordinary inspection of the wires before going to work upon it?

No. R. C. Gessner.

8. Did plaintiff Dixon, before the time of receiving his injuries, make any complaint or give any notice to his employer of any faulty condition in the trolley wires at that place?

From the evidence we conclude that plaintiff Dixon did not know of the faulty condition of wire. R. C. Gessner.

31 9. How long had plaintiff Dixon been employed by those operating the line of railway before receiving his injuries?

From the time he was first employed by the company; days and months unknown to jury. R. C. Gessner.

10. Was it necessary for plaintiff Dixon, in tightening the wire by use of block and tackle, to stand upon a box on top of car from which he was thrown, in the exercise of ordinary care?

Yes. R. C. Gessner.

11. Could he have tightened the trolley wire sufficiently for the task on which he was then employed by standing on top of the car at that time and not upon the box?

Yes. R. C. Gessner.

12. In the event that the trolley wire should break at that place while a person was standing on the box in the position where the box then was, would such a person in all likelihood be thrown from the top of the box by the wire to the streets?

Yes. R. C. Gessner.

13. Were there any kinks in the trolley wire on the curve at Depot and Stewart streets?

Yes; but had been hammered out. R. C. Gessner.

14. Did plaintiff Dixon's employer know of any such kinks at that place?

Yes. R. C. Gessner.

15. Was the trolley wire in use by plaintiff Dixon's employer at that place rotten?

Yes. R. C. Gessner.

16. Did plaintiff Dixon ever inform his employer that such wire was rotten?

From the evidence, we believe that plaintiff Dixon did not know of the rotten wire. R. C. Gessner.

17. Could plaintiff Dixon have done his work more safely by standing on the street and not upon the box or car while drawing the trolley wire back from the curve with the block and tackle?

Yes; but could not complete his work. R. C. Gessner.

18. Did any one in the employment of the receiver know
32 of defects in the trolley wire; and, if so, what was his name? Yes; D. Thomas Denny. R. C. Gessner, foreman.

Filed Feb. 11, 1897.
GEO. M. HOLLOWAY, *Clerk.*

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff, *vs.* FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Company, Defendant.	No. 22200. Notice of Intention to Move for New Trial.

To the above-named plaintiff, Samuel Dixon, and to John E. Humphries, E. P. Edsen, and Remsberg & Atkinson, his attorneys:

You and each of you will hereby please take notice that it is the intention of the above-named defendant, Frederick Bausman, as receiver of the Rainier Power & Railway Company, by his attorneys, to move the above-entitled court for an order granting a new trial of the above action and setting aside the verdict rendered therein on the following grounds:

1. Insufficiency of the evidence to justify the said verdict, and that the same is against law.
2. Error in law occurring at the trial of said action and excepted to at the time by said defendant.

BAUSMAN, KELLEHER, EMORY,
Attorneys for Defendant, Frederick Bausman, as Receiver.

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff, *vs.* FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Company, Defendant.	No. 22200. Motion for New Trial.

33 Comes now the above-named defendant, Frederick Bausman, as receiver, and moves the above court for an order granting a new trial of this action and setting aside the verdict herein, which said verdict was rendered in this cause on February 11, 1897, on the following grounds, to wit:

1. Insufficiency of the evidence to justify said verdict, and that the same is against law.
2. Error in law occurring at the trial of said action and excepted to at the time by said defendant.

This motion is based upon all the files and records in this cause and the evidence and proceedings occurring upon the trial thereof.

BAUSMAN, KELLEHER, EMORY,
Attorneys for Defendant, Frederick Bausman, as Receiver.

Due service of within motion & notice this 13 day of February, 1897, admitted.

REMSBERG & ATKINSON,
JOHN E. HUMPHRIES, AND
E. P. EDSEN,
Attorneys for Plaintiff.

Filed Feb. 13, 1897.
GEO. M. HOLLOWAY, *Clerk.*

In the Superior Court of the State of Washington for the County of King.

SATURDAY, *March 6th*, 1897.

SAMUEL DIXON
vs.
FRED BAUSMAN, Rec. } 22200

The defendant's motion for a new trial is overruled and an exception allowed.

O. JACOBS, *Judge.*

89–409.

34 In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver of the Rainier Power & Railway Co., Defendant. } No. 22200. Judgment.

Comes now the plaintiff, by Humphries, Humphrey & Edsen, and Remsberg & Atkinson, his attorneys, and the defendant, by Bausman, Kelleher & Emory, his attorneys, and the motion for a new trial is submitted to the court for hearing, and the court, being fully advised, denies and overruled the motion; to which ruling the defendant excepts, and, on motion of plaintiff, judgment is now rendered upon the verdict of the jury.

It is therefore ordered, considered, adjudged, and decreed that the plaintiff do have and recover of and from the defendant, Fred Bausman, as receiver of the Rainier Power & Railway Company, the sum of ten thousand dollars and costs of suit by plaintiff expended, and the said amount and judgment is payable out of the funds held by said Bausman, as receiver of said company, which come into the hands of said receiver and are held by him as receiver, and funds belonging to the receivership which are applicable for that purpose which may hereafter come into the receiver's hands or under direction of the court appointing such receiver; to all of which the defendant excepts.

Done in open court this 8th day of March, 1897.

O. JACOBS, *Judge.*

Filed Mar. 8, 1897.
GEO. M. HOLLOWAY, *Clerk.*

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Company, Defendant.

No. 22200. Notice of Appeal.

35

To the above-named plaintiff, Samuel Dixon, and to his attorneys, John E. Humphries, E. P. Edsen, and Remsberg & Atkinson:

You and each of you will hereby please take notice that the above-named defendant, Frederick Bausman, as receiver of the Rainier Power & Railway Company, appeals to the supreme court of the State of Washington from that certain judgment, and from the whole thereof, rendered in this cause in the superior court of King county, Washington, on March 8, 1897, in favor of said plaintiff, Dixon, and against said defendant, Bausman, as receiver, in the sum of ten thousand dollars and costs.

Dated March 9, 1897.

BAUSMAN, KELLEHER & EMORY,
Attorneys for said Defendant, Frederick Bausman, as Receiver.

Due service of within notice of appeal this 9 day of March, 1897, duly admitted.

JOHN E. HUMPHRIES,
E. P. EDSEN, &
REMSBERG & ATKINSON,
Attorneys for Plaintiff.

Filed Mar. 9, 1897.
GEO. M. HOLLOWAY, *Clerk.*

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Respondent,
vs.
FREDERICK BAUSMAN, as Receiver of Rainier Power & Railway Company, Appellant.

No. 22200. Bond on Appeal.

Know all men by these presents that we, Frederick Bausman, as receiver of the Rainier Power & Railway Company, as principal, and A. M. Brookes and W. J. Grambs, as sureties, are held and firmly bound unto Samuel Dixon, the above-named respondent, in the just and full penal sum of two hundred dollars; for the payment of which, well and truly to be made, we acknowledge
36 ourselves, our respective successors, heirs, administrators, and executors, to be jointly and severally firmly bound by these presents.

In witness whereof we have hereunto set our hands and seals this 9 day of March, 1897.

The condition of the foregoing obligation is such that whereas, in the above-entitled action and court, judgment was recovered on

March 8, 1897, in favor of above-named respondent, Dixon, and against the above-named appellant, Bausman, as receiver of the Rainier Power & Railway Company, in the sum of ten thousand dollars and costs, and whereas said Bausman, as receiver, has appealed therefrom by written notice served and filed March 9, 1897: Now, therefore, if the said appellant shall and will well and truly pay all costs and damages which may be awarded against him upon the said appeal, or upon the dismissal thereof, not exceeding two hundred dollars, then this obligation to be null and void; otherwise to remain in full force and virtue.

FRED BAUSMAN, [SEAL.]
As Receiver Rainier Power & Railway Co.
A. M. BROOKES. [SEAL.]
W. J. GRAMBS. [SEAL.]

In presence of—
G. M. EMORY.

STATE OF WASHINGTON, } ss:
County of King, }

W. J. Grambs and A. M. Brookes, being each first duly sworn, each for himself on oath deposes and says: I am one of the sureties who signed the foregoing bond; I am a resident of the State of Washington and am worth the sum of two hundred dollars, over and above all debts and liabilities, in property within the State of Washington, exclusive of property exempt from execution.

A. M. BROOKES.
W. J. GRAMBS.

Subscribed and sworn to before me this 9 day of March, 1897.

37 [SEAL.] M. B. HAYNES,
Notary Public in and for the State of Washington, Residing at Seattle.

Due service of within bond on appeal this 9 day of March, 1897, duly admitted.

J. E. HUMPHRIES,
E. P. EDSEN, AND
REMSBERG & ATKINSON,
Attorneys for Pl'ff.

Filed Mar- 9, 1897.
GEO. M. HOLLOWAY, *Clerk.*

In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Company, Defendant.

No. 22200. Notice of Filing Statement of Facts.

To Samuel Dixon, the plaintiff above named, and to John E. Humphries, E. P. Edsen, and Remsberg & Atkinson, your attorneys of record:

You and each of you will please take notice that defendant has on this 19th day of March, 1897, filed in the clerk's office of the superior court of King county, State of Washington, a statement of facts, complete and ready for signing, of which a copy is herewith served upon you.

BAUSMAN, KELLEHER & EMORY,
Attorneys for Defendant.

Service of the above notice hereby accepted this 19th day of March, 1897, together with a copy of the statement of facts referred to above.

JOHN E. HUMPHRIES,
E. P. EDSEN, AND
REMSBERG & ATKINSON,
Attorneys for Plaintiff.

Filed Mar- 20, 1897.
GEO. M. HOLLOWAY, *Clerk.*

38 STATE OF WASHINGTON, } ss:
County of King, }

I, Geo. M. Holloway, county clerk of King county and *ex officio* clerk of the superior court of the State of Washington for the county of King, do hereby certify that the foregoing is a true and correct transcript of so much of the record as I am required by appellant to transmit to the supreme court of appeal, in cause # 22200, as appears from the files and records of my office, together with the statement of facts & exhibits.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 7th day of April, A. D. 1897.

[SEAL.]

GEO. M. HOLLOWAY, *Clerk,*
By JOHN WALLACE,
Deputy Clerk.

39 Proposed statement of facts. Samuel Dixon, pl'ff, *vs.* Frederick Bausman, as receiver Rainier Power & Railway Co., def't. Filed Mar. 19, 1897. J. H. P. Geo. M. Holloway, clerk. I. H. P.

40 SAMUEL DIXON, Plaintiff,
vs.
FREDERICK BAUSMAN, Rec., Defendant. } Testimony and Proceedings.

41 *Index.*

	Dr. ex.	Page.	Cr.-ex.	Page.
Plaintiff's witnesses:				
A. H. Alexander	"	1	"	7
John Burroughs	"	14	"	21
James Henry	"	22	"	24
Samuel Dixon	"	27	"	41
Dr. W. M. Patterson	"	48	"	52
C. E. Remsberg	"	55	"	56
Mrs. S. B. Dixon	"	58	"	....
Deposition of Geo. B. Stocks and Geo. Newall following page 143.				
Plaintiff's rebuttal:				
H. Honnen	"	124	"	....
John Burroughs	"	126	"	....
Samuel Dixon	"	127	"	....
Plaintiff's exhibits:				
A, B, C, & D (pieces of trolley wire and ear).				
Defendant's witnesses:				
D. Thomas Denny	"	65	"	70
G. S. Winchell	"	79	"	83
D. T. Denny	"	92	"	....
S. L. Shuffleton	"	93	"	95
W. J. Grambs	"	98	"	100
Recalled	"	104	"	....
J. R. Oakley	"	106	"	108
M. J. O'Donnell	"	115	"	117
D. C. Epp	"	119	"	121
Defendant's exhibits:				
No. 1 (chart).				

42 In the Superior Court of the State of Washington in and for the County of King.

SAMUEL DIXON, Plaintiff,
vs.
FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Company, Defendant.

No. 22200. Testimony and Proceedings.

Be it remembered that this cause came on regularly for trial on the 8th day of February, 1897, before Honorable Orange Jacobs, one of the judges of the above-entitled court, a jury being duly empaneled to try the same, the plaintiff appearing in person and by his counsel, Messrs. Humphries, Humphrey & Edsen, the defendant appearing in person and by his counsel, Messrs. Bausman, Kelleher & Emory; whereupon the following testimony was offered and the following proceedings were had:

After the statement of plaintiff's case by Mr. Humphries the depositions of George Stocks and George Newall were read to the jury. See page 143½ *et seq.* for depositions.

ALFRED H. ALEXANDER, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

(By Mr. HUMPHRIES:)

Q. What is your name?
A. Alfred H. Alexander.
Q. Did you know George Stocks?
A. Yes, sir.
43 Q. How long did you know him?
A. I knew him for about six years nearly.
Q. Do you know what position he held with reference to the Rainier Power & Railway Co. at any time?
A. Yes, sir; he helped constructing the line there; then at one time, near the last, he was a boss, and then he worked on the cars.
Q. He was what, you say?
A. He worked helping construct the line at the first and then next he was boss for a short time; then he worked on the cars some.
Q. He was boss of the line, you mean?
A. He was the boss of erecting some poles and clearing some snow from the track and the likes of that along the road.
Q. Who was the superintendent of the line at the time of construction?
A. I believe Mr. Denny was general superintendent.
Q. Who had charge of the construction of the line?
A. Mr. Wolf.
Q. What Wolf is that?
A. J. M. Wolf.
Q. Did you help construct this line at the point where Stewart and Depot streets meet?
A. Yes, sir.

Q. You may explain to the jury what kind of ears you put around that curve at first.

A. They are short ears—some call them clamp-ears—screwed together.

Q. What do you mean by a short ear?

A. I would call that a short ear (referring to one held by Mr. Humphries)—about three or four inches long.

44 Q. Is that one of the ears that was on that line?

A. That is like one of those we put on there. I don't know whether that is one of them or not.

Q. What sized wire is that made for originally?

A. That has been hammered up so I can't state; but those we put on there were made for No. 0 wire.

Q. No. 0 wire. What kind of wire was this?

A. No. 4.

Q. What sized wire is this (handing wire to witness)?

A. I should judge that was No. 0 wire.

Q. What sized wire is this (handing another piece of wire to witness)?

A. No. 4.

Q. That is the No. 4 wire?

A. I should judge it was; yes, sir.

Q. What kind of ears did you finally put on?

A. We put on a soldered ear; a longer ear than this; probably twice as long; probably a little bit longer.

Q. (Handing ear to witness.) How did the ear put on resemble this one?

A. It looked very much like that, but it wasn't as long—possibly that long (indicating)—between my fingers; probably eight inches, more or less. That is a longer ear than we used.

Q. But the ear was generally in this shape that you put on?

A. Yes, sir.

Q. When you were changing the ears what did you notice, if anything, of any kinks in the wire?

A. These short ears made kinks in the wire; made bends at each end—short bends—the ears that we put on.

Q. What do you mean by kinks or short bends in the

45 wire; something like that (illustrating)?

A. I would call that a bend or kink.

Q. You would call that a kink?

A. Yes, sir.

Mr. BAUSMAN: Call what a kink?

Mr. HUMPHRIES: This bend in the wire—this kink.

Q. What did you do with the kinks that were in the wire?

A. After we—while we were changing the ears we straightened those out.

Q. How did you straighten them out? Just explain to the jury how you did it.

A. We took a hammer and placed an iron or something on the

opposite side and pounded on it until we got it straight. I don't just recollect what it was we held on the opposite side.

Q. Now, at that particular place there, what did you do with reference to soldering the long ear on the under side of the wire?

A. At one particular place one of those clamp-ears failed to hold at its place. The pull-off wire didn't pull direct, and it wouldn't stay in its place; it would slip down the trolley wire, and it was soldered, when first put up. One or two on that curve were soldered.

Q. Did you solder the top one on the wire in that shape (illustrating)?

A. We soldered the lower one on.

Q. Which one was it you soldered on?

A. One like that one you have in your hand or one like it.

Q. Now, was the short ear fastened on the under part of the wire, in this shape—the top of it (illustrating)?

A. Yes, sir.

46 Q. How was it fastened on the wire?

A. It was soldered.

Q. Soldered there (indicating)?

A. Yes, sir.

Q. Now, how did you get these on? Was the natural place for this long ear up on top of the wire?

A. No; the natural place was to be under it when you soldered it—while you were soldering it.

Q. But when it is finally done where do you put it?

A. Turn it around on top.

Q. Now, with this fastened at this point (indicating) solid to the wire and this fastened to this point, how would you turn it around on top?

A. We left blocks on the opposite side of that wing there and put a strain on and turned it around.

Q. Just twisted it right around?

A. Yes, sir.

Q. Well, how much would that twist the wire?

A. It would twist it about half way around—the trolley wire.

Q. I will ask you to look at that wire and see if it has been twisted at the point where the kinks are. (Hands wire to witness.)

A. It looks like it had.

Q. Would it make a twist in it something like that?

A. Yes, sir.

Q. How many twists—how many of these kinks were in the wire at this point around the curve at Stewart street and Depot?

A. Like that kink you have described there, there was only one.

Q. Only one like that?

A. That twist I mean.

47 Q. You would call this both a twist and a kink?

A. Yes; I would.

Q. Now, when you put the short ears upon the wire at first how did you make the short ears stay upon the wire?

A. We screwed them together and p-unded them. If they didn't stay then, we soldered them.

Q. You screwed them together and p-unded on them. If they did not stay then, you soldered them?

A. Yes. If the span wire would not pull off direct, they were left one side; if they were too bad, we would solder them.

Q. What do you mean with reference to pounding them together? Say the wire would not stay in there, do you mean you pounded them in the shape this was in (handing wire to witness)?

A. Pounded just together this way (illustrating), the largest.

Q. Pound the largest together and hold onto the wire yourself?

A. Yes, sir.

Q. How many kinks were in that wire around the bend there?

A. It was kinked nearly at every ear—that is, short bends in it at nearly every ear.

Q. What, if anything, did you say to Mr. Wolf about that?

A. At the time that twist was made I mentioned it to him.

Q. You called his attention to it, did you?

A. Yes, sir.

Q. What did he say about it?

A. I don't recollect just what he did say, but he thought it was all right—"Go ahead," or something like that—something to that effect.

MR. HUMPHRIES: That is all.

48 Cross-examination.

(By Mr. BAUSMAN:)

Q. When was this which you say Mr. Wolf did—when was this construction done?

A. I think it was in 1892; I wouldn't be sure.

Q. Well, what time in 1892, as near as you can remember?

A. The time these ears were changed; it was some time in the fall of the year, I think.

Q. And this accident did not occur until in June, 1893?

A. About June some time, 1893.

Q. Now, you spoke of Mr. Wolf. Mr. Wolf had charge of the original construction of the line; is that it?

A. Yes, sir.

Q. At the time you spoke to him he was not in the employ of the railway company?

A. He was in the employment, I believe, of Mr. Baker.

Q. Of the construction in the employ of Mr. Baker?

A. Mr. Baker.

Q. He was not at that time superintendent of the railway; that is what you mean?

A. I mean he was superintendent for Mr. Baker. Mr. Baker had the contract of the line, I understood.

Q. Yes, sir; that is right; consequently he was not the superintendent of the railway. That is all.

Redirect examination.

By Mr. HUMPHRIES:

Q. Mr. Wolf, after the road was constructed, then was superintendent of the wires for the company, wasn't he?

A. He worked for the company; yes, sir.

Q. How long did he continue to work for the company?

A. I can't give it exactly; possibly six months; maybe more.

49 Q. After this?

A. Yes, sir.

Q. Now, you may state, Mr. Alexander, in fastening a span wire to a trolley wire, which side is it proper to stand upon in fastening them together?

A. I think outside of the curve would be the proper place.

Q. Outside of the curve?

A. Yes, sir.

Mr. HUMPHRIES: That is all I want to ask you.

Recross-examination.

(By Mr. BAUSMAN:)

Q. Now, Mr. Alexander, I want you to look at that plat. That gives a fair idea, does it, of the curve (showing witness plat)? That gives a fair idea of that curve? Is that correct or approximately correct?

A. It looks as though it was upside down.

Q. I started from the wrong end to show you, maybe.

A Yes; I think it looks very familiar; that looks familiar. It looks as though, if I recollect right, there was more than one wire at these poles furthest away off at that time. I see there is only one here. There was two on each of these.

Q. Now, this is the trolley wire, is it—this wire going through there (indicating)?

A. Yes, sir.

Q. These are what they call the span wires, are they not (ind.)?

A. Yes, sir; pull-off wires.

Q. Now, if the trolley wires—if the span wires are on there, as they appear at intervals there, it might be safer, might it not, to stand on the inside of that?

A. No, sir; I don't think it would.

50 Q. Why not?

A. Because the span wire is more liable to break than the trolley wire would be in putting it in place.

Q. Yes; but are there not quite a number of span wires?

A. Yes; there is quite a number.

Q. Therefore they don't all have to break before the wire would slip in this way (indicating)?

A. One of them would necessarily have to pass over the side of the car and knock you off.

Q. What would?

A. If one of the span wires would break, and you standing on this, it would swing in a straight line.

Q. That would depend considerably on circumstances, would it not; on the degree of the curve and other things?

A. Yes, sir.

Mr. BAUSMAN: That is all.

Redirect examination.

(By Mr. HUMPHRIES:)

Q. You say at the time of this injury there was but one wire at a place instead of two, as they have now?

A. If this represents the longest distance (referring to plat), there was only one wire at one of these places; I don't recollect just which.

Q. What do you call this wire here (ind.)? You say this is a span wire here?

A. Pull-off wires.

Q. These are pull-off wires?

A. Yes, sir.

Q. And sometimes they are called span wires, are they not?

A. Yes; sometimes.

51 Q. At that time here was only one wire, like this (indicating)?

A. Over here and here was only one wire (indicating).

Q. How was it along here (ind.)?

A. We had two.

Q. Two; but here and here (ind.) was only one?

A. There was only one place with one on this curve.

Q. Where was it you made that twist of the wire?

A. It was right in here somewhere. It was right about the center of this first curve.

Q. How many kinks did you pound out around that curve?

A. We pounded out short kinks on nearly every one of them.

Q. How many were there?

A. On the whole curve, you mean?

Q. Yes; how many ears—can you give them approximately from this—how many ears there were around that curve?

A. No; I couldn't say exactly how many there were around the curve. I think there was about seven. I am following this curve here. I think there was about seven or eight; something like that.

Q. Now, when one of the span wires gets loose, then the trolley wire swings in in a straight line across here as near as it can, does it?

A. Yes; for instance, naturally, if one would break loose here it would swing in a straight line from here over to here (ind.).

Q. From there would be a straight line?

A. Yes, sir.

Q. Now, if you were on that side it would knock you off, would it not be apt to (indicating)?

A. Be apt to; yes.

Q. So that if a trolley wire did break there the proper place
52 is on the outside of the wire, on this side, is it not?
A. Yes, sir.

Mr. HUMPHRIES: That is all.

Recross-examination.

(By Mr. BAUSMAN:)

Q. Now, breaking that span wire might cause the trolley wire to slip inwards toward the curve?
A. Yes, sir.
Q. The distance which it would swing in would be a straight line—direct line drawn from the next span wires that remained?
A. Yes, sir.
Q. Therefore, if you stand on the outside of the curve and the trolley wire breaks, everything goes down with it, does it not?
A. Yes, sir.

Mr. HUMPHRIES:

Q. That is owing——
A. It is owing to which side he was on. If he was standing here (indicating) the trolley wire would slip over him and it wouldn't hurt him.
Q. Why?
A. Because it would part this way (indicating).
Q. Do you mean to say that if he stood there (indicating) and the trolley wire broke—that great trolley wire with all these span wires—he standing on the outside here, you say it would not rush against him?
A. If he was standing here (ind.) and the trolley wire
53 should break on that side of him, above him, it wouldn't touch him.
Q. It would strike him, would it not?
A. No, sir.
Q. There is just a limited space in which he could stand to avoid it?
A. He could avoid it by standing on this side here, on this side in here (indicating). By standing on this side in here (indicating), if it broke here it would knock him off; if he was on this side, and it broke this side of that line, it wouldn't hit him.
Q. Now, there is just a small distance there in which he could stand with perfect safety, is there not?
A. There is one side he could stand with perfect safety, if he he knew on which side it was going to break.
Q. Answer the question; isn't there only one space there where he could stand with pertect safety—that is true? Answer the question.
A. There is no place he could stand with perfect safety, I don't think.
Q. Is there not a place there at which he would stand with great danger?

A. Yes, sir; there might be.

Q. Now, what place is there that he could stand with perfect safety?

A. I don't think there is any.

Q. What place is there where he could stand with great safety?

A. I don't think there is any, standing below.

Q. It is a dangerous business?

A. Yes, sir; it is.

Q. The best thing is to stand below?

54 A. Yes; he could stand below it.

Q. And he could do the work?

A. No; he would have to take hold of the wire to do the work.

Q. He could stand below it?

A. He could stand below it and draw it in place, but he could not stand below it and make the tie.

Q. That is it. He could accomplish the strain by standing below, could he not?

A. Yes, sir.

Q. And after he had accomplished the strain, then he could get up and make the connections?

A. Yes, sir; tie it.

Mr. BAUSMAN: That is all.

(Testimony of witness closed.)

55 JOHN BURROUGHS, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

(By Mr. HUMPHRIES:)

Q. What is your name?

A. John Burroughs.

Q. Did you ever work for the Rainier Power & Railway Co.?

A. Yes, sir.

Q. When?

A. From the commencement of the construction of their line up to within about a year ago I worked more or less for them.

Q. Did you know George Stocks?

A. Yes, sir.

Q. What was he doing for the Rainier Power & Railway Co.?

A. George worked on the construction of the line, on the repair work.

Q. Then what did he do after that?

A. I believe he was foreman for a short time; then he got work on the cars.

Q. Foreman of what, the line?

A. Foreman of the repair work, construction work on the line.

Q. Then he afterwards worked on the car?

A. Yes, sir.

Q. What did J. M. Wolf do?

A. Wolf was foreman, superintendent of construction.

Q. What did he do after that time?

A. That was his business all the time he was working for the company.

Q. When did he quit working for the company?

A. I don't just remember. He quit working for the company the time he was appointed on the board of public works.

56 Q. What was it you did in the construction?

A. At the time of the construction of this particular part of the road?

Q. Yes, sir.

A. I was working under the contractor.

Q. Working for the contractor?

A. On the rails.

Q. What do you know, if anything, about when this trolley wire was constructed there and the change in the ears was made—about the kinks being pounded out?

A. Mr. Baker instructed me to remove the wires at that time at that curve to allow a house to pass down Stewart street across Depot. I removed the wires at that point and saw the defects in the wire.

Mr. BAUSMAN: I object to that, your honor. The complaint made against us here in Mr. Dixon's complaint is that the company took down these wires to allow a house to be passed under them. It is plain to your honor already that the testimony which is now introduced does not relate to anything the company did, but to what one Baker did who built the line before the company had it. The relevancy of that strikes me as extremely improbable. I think your honor is justified in confining them to the testimony that relates to what we did.

Mr. HUMPHRIES: The part about taking down the line and putting the house through is not the point that is concerning me very much. I am asking him now what he knows about these kinks being pounded out, and, preliminary to that, he is telling how he came to know about it; that he took down the line and examined it. But I will remove *any* question in answer to the objection and ask him directly if he ever examined this.

57 (On motion of counsel for defendant, the portion of the testimony of the witness relating to what occurred in moving the house with Mr. Baker is stricken out.)

Q. Now, I will ask you the question direct if you ever examined this line, the trolley wire, at this point after its construction.

A. Yes, sir.

Q. What did you notice, if anything, in regard to the kinks, there having been kinks and the kinks having been pounded out, from your examination?

A. I noticed that the wire had been injured by that process from the separation of it.

Q. How many places in it did you notice that the kinks had been pounded out?

A. At that time the kinks had not been pounded out. The kinks were still in the wire at the time I examined it.

Q. You noticed that the kinks were in the wire?

A. Were in the wire at that time.

Q. Did you examine it after they were pounded out?

A. No, sir.

Q. Now you may state to the jury if you saw them at any time pounding the kinks out.

A. Yes; I saw them doing the work right along. They would pound out kinks when they would come to them.

Q. Who was pounding them out?

A. Mr. Stocks mostly; sometimes Mr. Alexander. There were other men on the car.

Q. But you saw Mr. Stocks pounding the kinks out?

A. Yes, sir.

Q. What do you know, if anything, about them pounding
58 the ears together over the wire?

A. I noticed that the ears had been pounded to make them fit the wire.

Q. Do you know whether this is one of the ears or not (show'g)?

A. It looks like one; it is about the same pattern.

Q. What did you notice with reference to them, where they were pounded—did they resemble this ear?

A. Oh, just about the same thing—nearly the same.

Q. You say this is a similar ear, and resembles the way they looked after they had been pounded together?

A. Yes; somewhat. There was ragged edges on the inside of them, without being finished.

Q. In pulling the trolley wire back on a curve and joining it with the span wire, do you know which is the proper side to stand upon?

A. Outside the curve.

Q. You mean on this side (indicating)?

A. Yes, sir.

Q. Do you know at the time this road was first constructed, the time of the injury, how many of these guys or span wires there were running out at this point?

A. At each one of the long spans there was only one wire.

Q. Only one wire that ran out?

A. Yes, sir.

Q. Now, when this one wire is loosened from the trolley wire, then the trolley wire swings in a straight line from this point to this (indicating), does it not?

A. Yes, sir.

Q. What effect does it have upon the trolley wire to pound the kinks out?

59 A. It injures the wire more or less.

Q. In what way do you mean it injures it?

A. By causing it to be more apt to break at those points where it is injured.

Q. What about injuring the fiber of the wire?

A. The greater the injury the more liable it is to break.

Q. Do you know what piece of wire that is (showing)?

A. That is a piece of wire of the same quality; at least, that is off the same road.

Q. Off the same road?

A. Yes, sir.

Q. Now, if you fasten a short ear on top of this wire at this point (indicating) and one of these longer ears soldered on the other point, and then twist them around so as to bring the other ear upon the top, what effect would that have upon that wire?

A. If the first ear was fastened to the span wire——

Q. (Interrupting.) Suppose they were both fastened?

A. It would twist the wire; couldn't possibly help it.

Q. You mean to state that it would make a twist in the wire similar to the twist in this wire (showing wire to witness)?

A. Somewhat similar; yes, sir; it couldn't possible stay unless the strain was on the wire the same as it is on the trolley wire.

Q. Suppose the twist was made in this wire, and then after that this was pounded out straight, what effect would it have upon it, in this twisting, if you were to take a hammer and anvil and pound it out straight?

A. It is liable to break it—weaken it.

(Exhibits wire to the jury.)

60 (Wire just referred to offered in evidence by counsel for plaintiff, and, there being no objection, the same is admitted in evidence and marked Plaintiff's Exhibit "A.")

Q. You say that would have a tendency to weaken it?

A. Yes, sir.

Q. What do you mean by there being a strain upon both wires?

A. There is a strain on the wire of the weight—natural weight of the wire, not being held up properly on the curves. The wire is generally a little higher—the weight of the span wires.

Q. Then there was a strain lengthwise and a strain sideways?

A. Yes, sir; to a certain extent.

Q. Explain to the jury whether or not there was any extra strain on this wire at this particular point, going around that curve.

A. There was a great strain on that curve.

Q. A great strain?

A. It was hard to get it into place.

Q. Did you know Mr. Dixon at the time he was working there?

A. Yes, sir.

Q. What was he doing?

A. He was a car-repairer.

Q. What do you mean by a car-repairer?

A. All that ever I knew him to do was to work in the barn at the time we were working on the road.

Q. He was working in the barn as car-repairer?

A. Yes, sir.

Q. Who was superintendent of the road, managing it?

A. Mr. Denny was manager.

Q. Which Denny?

A. Mr. Thomas Denny.

61 Q. D. Thomas Denny?
A. As far as I know.

Mr. HUMPHRIES: That is all.

Cross-examination.

(By Mr. BAUSMAN:)

Q. You were at work there under Mr. Baker, were you?
A. At the particular time, you mean?
Q. Yes, sir.
A. At the time I worked on the curve I was at work for Mr. Baker; yes, sir.
Q. Now, you spoke of Mr. Dixon being at work car-repairing?
A. Yes, sir.
Q. When was that? When did you leave the road?
A. I worked for the road up to within about a year from this time; most a year.
Q. A year from which time?
A. Within a year of today.
Q. Of today?
A. Yes, sir; I think it is a year since I quit work and left the company.
Q. You left the Third Street road about a year ago?
A. Yes; less than a year.
Q. In what capacity were you working there?
A. On track-work. The last work I done was on the track-work.
Q. (Showing witness plat heretofore referred to.) Is that correct? If it is not, show us where it is not correct.
A. That is nearly correct, as near as I can tell.
Q. You would call that a correct picture of the curve?
A. Well, not exactly to my mind it isn't.
Q. Just kindly point out where it is not correct.
62 A. These ears are not proportioned in distance quite as they were. They were a little closer together, I think. I think there is a little more proportion—a slight variation—that is, there is a slight variation in the spans—in the guys there.
Q. You were speaking about what was the right side of the curve to stand upon in repairing the wire. If one stood under the wire one would not be hit by it in any event, no matter which way it went, would he? Answer the question.
A. That question can't hardly be answered.
Q. If one were to stand under the wire and inside and abreast of it, then when the wire breaks would he be struck by the wire and knocked off?
A. If he stood far enough underneath it wouldn't hurt him.
Q. It wouldn't hurt him?
A. It wouldn't him, I don't suppose.

Mr. BAUSMAN: That is all.

Redirect examination.

(By Mr. HUMPHRIES:)

Q. That is not the usual way to work to repair a wire in that shape, is it?

A. No, sir; you can't do the work.

Q. You couldn't do the work in that way?

A. Not that way—with the strain up over a man's head, you couldn't do all the work.

Q. The fact is, in attaching a span wire in this way you have to be up there where you can do that work, do you not?

A. Yes; have to take up the slack.

Q. Take up the slack as fast as you take it?

A. Yes, sir.

Mr. HUMPHRIES: That is all.

(Testimony of witness closed.)

63 (Counsel for plaintiff offers in evidence the wires and ear referred to in the testimony, and the same are admitted without objection and marked with a tag as Plaintiff's Exhibits A, B, C, and D.

JAMES HENRY, a witness called on behalf of plaintiff, being firs duly sworn, testified as follows:

(By Mr. HUMPHRIES:)

Q. What is your name?

A. James Henry.

Q. What is your age?

A. Twenty-two.

Q. Where do you reside?

A. Northeast corner of Sixth and Pine.

Q. What is your occupation?

A. Conductor on the street railway.

Q. What was your occupation in June, 1893?

A. June, 1893, I think I was on the track of the Third St. & Suburban, taking care of the track—greasing the curves.

Q. Did you know Mr. Dixon?

A. I knew him by being around the barn there; yes, sir; about six months previous to June.

Q. What was he doing around the barn?

A. Car-repairer at the time.

Q. Did you go out with him to this curve at the corner of Stewart and Depot streets?

A. Yes, sir.

Q. What time of the day did you go out there?

A. I think it *would* 10.30 we reached Depot street.

Q. What were you doing out there?

A. Went out to replace an ear on the wire that had come

64 off. There was two ears off—one on the corner back of Pontius house. We first fixed that ear and then proceeded on up to Depot and Stewart streets.

Q. What do you mean by the ear; like these ears there (referring to ear used in examination of previous witnesses)?

A. Yes; similar to that.

Q. Similar to that?

A. Yes, sir.

Q. What occurred when you got up to the second place?

A. We went to work first and unsoldered the old ear; then cleaned the wire and replaced a new ear on; then we went to work to pull the line—the wire over in line—so we could put on the span wire.

Q. Then what occurred?

A. In doing so the wire broke and Mr. Dixon he fell from the top of the car to the ground.

Q. What occurred then?

A. Well, I got down from the car and proceeded to give him what assistance I could. In taking hold of him I got a shock which knocked me down on the ground; then I searched for a stick and got the wire out from under Dixon, then rendered him what assistance I could to get him to a place of safety.

Q. What do you mean by saying you got a shock?

A. I couldn't account for it; all I know is I got a shock; that is all.

Q. You didn't take hold of his feet any more?

A. No, sir; I did not.

Q. Then where did you take him?

A. We took him in a little house back of the church there first; from there we took him home in the patrol wagon.

65 Q. Had you ever been out with him before?

A. No, sir.

Mr. HUMPHRIES: That is all.

Cross-examination.

(By Mr. BAUSMAN:)

Q. How did you happen to go out with Mr. Dixon that day?

A. Mr. Dixon requested me to. I was at the time fixing my headlight at the barn and he requested me to accompany him.

Q. Did you express any surprise to him about his going out?

A. No, sir.

Q. Did you tell him that was not his business, to repair the wire?

A. No, sir.

Q. The fact is, you thought it was, didn't you?

A. I didn't know anything about it. I looked up to Mr. Dixon as my superior. He had been in the car barn there. He gave me my directions when the superintendent was not around.

Q. He went out to repair the other ear, as well as this one?

A. Yes, sir.

Q. And what did he do—what did he take with him; the regular car used for that purpose—the car they used for that purpose?

A. The car they used for that purpose; yes, sir.

Q. Did he make any remarks to you about not being acquainted with business?

A. No, sir.

Q. He went out as though he knew all about it?

A. He went at his work. I was not acquainted with the work at the time myself. I didn't know anything about the trolley wires.

Q. Did you ever see any other man with Mr. Dixon re-
66 pairing these trolley wires?

A. No, sir.

Q. Didn't it seem to be his business?

A. I never saw Mr. Dixon before out on the wire.

Q. You say you did not?

A. No, sir.

Q. But on this occasion he was the one that asked you to go out with him to repair the wire?

A. Yes, sir.

Q. You obeyed him and went with him?

A. I went with him.

Q. He took the car with him and all the implements?

A. Yes, sir.

Q. He directed where you should go?

A. Yes, sir.

Q. And what you should do?

A. Yes, sir.

Q. And what position you should take?

A. Yes, sir.

Q. Did he say anything or do anything which indicated that he did not know just exactly what he was doing?

A. Not as I know of.

Q. It didn't seem surprising to you that he was doing that business, did it?

A. No; I can't say that it did. I didn't know his work. I knew my own work; that was all. I was on the road myself all the time; maybe away out at Brooklyn or Ravenna park, and I didn't know what he was doing around the barn.

Q. You happened to be there that time?

A. I happened to be there taking care of the headlights.
67 Usually I took care of them in the morning, and had them ready for the night.

Q. Did any other person give you orders to do this?

A. No, sir.

Q. Mr. Dixon gave you the orders?

A. Mr. Dixon gave me the orders.

Q. Do you know if any one else repaired the trolley wires?

A. No, sir.

Q. You never paid any attention to that?

A. No, sir; I wasn't on the road only about a month prior to the accident—that is, on the road division. I did work in the light department.

Q. So that after that you don't know whether anybody else re-

paired them or not—you don't know whether that was done by Mr. Dixon or not?

A. I don't know whether it was or not; I couldn't tell.

Q. All you know is that he was there and ordered you out, and you went out with him?

A. I went with him.

Q. Is that plat a reasonably correct picture of the curve there?

A. Yes, sir; it is as near right as my recollection is—as I can remember.

Q. It is a good many years ago?

A. Well, I haven't been out there for about a year now—on the curve.

Q. You would call that a correct picture of the curve, would you not?

A. Yes; I should—that is, from Stewart street around onto Depot I would. The place of the accident I should call about cor-
68 rect.

Mr. BAUSMAN: That is all.

(Testimony of witness closed.)

SAMUEL DIXON, the plaintiff, being first duly sworn, testified as follows:

(By Mr. HUMPHRIES:)

Q. What is your name?

A. Samuel Dixon.

Q. Where do you live?

A. I live at present in Fremont.

Q. What is your age?

A. I am thirty-nine past.

Q. What month were you born in?

A. October 2nd, 1857.

Q. Were you ever employed by the Rainier Power & Railway Co.?

A. Yes, sir.

Q. When?

A. I think I went to work some time in July, 1891. I don't know the exact date, but somewhere about the 20th; maybe a few days later; maybe a day or two earlier.

Q. Who was the superintendent and manager at the time you went there?

A. Mr. D. Thomas Denny was the man that hired me.

Q. What did he hire you to do?

A. He hired me as a car-repairer.

Q. Explain to the jury what that is.

A. Well, it is to take care of the cars and repair them. Of course, there is quite a good deal of repairing to do, both about the machinery, wood-work, and the wiring.

Q. Where did you work?

69 *Q. Where did you work?*

A. I worked at their car barn out at Lake Union.

Q. Who had charge of the lines?

A. When I went there, there was only a part of the road constructed—from the end of the Lake Union line to Brooklyn. They operated that road, I think, something like nearly a year. Then they continued it from Brooklyn to Ravenna park. It was in operation a short time before the line was completed downtown. Mr. Wolf was working on the line, on the construction of it.

Q. Now, after the line was completed around the curve at Stewart street and Depot and accepted by the company, what did Mr. Wolf do?

A. I think he was lineman, maybe, for a short time. Then just about that time, in January before I was hurt, he was put into the board of public works, and he quit their employ.

Q. Up to the time he was put in the board of public works what did he do?

A. He had been working for them on the road and in the light department; set poles and constructed the line; worked off and on, I think, before I went there; up until about that time.

Q. What do you know, if anything, after Wolf quit, about George Stocks being in charge of that part of it?

A. George Stocks told me that he was to take Wolf's place after Wolf went into the board of public works. Along in February, 1893, there was a big snowstorm that, I think, lasted about fifteen or sixteen days, and in doing this track-work Stocks had his men out cleaning snow and kept their time and reported it; told me he had charge of the line; that he moved wires and some poles down on Third street.

Q. What was his place? What was Wolf's place?

70 A. He had been foreman there, superintending the construction of the line.

Q. What do you — about Wolf's working there after he was alderman?

A. He continued working right along for them while he was alderman and up until he was appointed on the board of public works.

Q. Then who did their line repairing?

A. Mr. Stocks, what little there was done then. Their road had been completed. There wasn't but very little work then.

Q. Who had charge of the line, the repairing—who had charge of it, overseeing it?

A. Well, Mr. Denny was the manager and Mr. Winchell was superintendent of the road.

Q. How long did Mr. Winchell serve?

A. Well, he was there with the company, I think, all the time I was there.

Q. Who was serving as manager of the road at the time you were hurt?

A. Mr. D. Thomas Denny—that is, to the best of my knowledge he was still the manager.

Q. Where was Mr. Winchell?

A. He was superintendent.

Q. And where was Mr. Stocks?

A. Mr. Stocks at that time, I think, had been broken in as a motorman or conductor on the car some month or two previous to that.

Q. You may state if the same management was in charge of the road there; if Mr. D. Thomas Denny was manager and Mr. Winchell superintendent at the time Mr. Backus was appointed receiver.

71 A. Yes, sir; there was no changes I know of at all.

Q. Now when, if at any time, did you ever go out to do any repairing upon the line?

A. I think some time that spring, in 1893, after they had done changing some light plant, wires and poles, I think, they dispensed with Stocks and the men, and some month or two previous to this accident Mr. Denny requested me that I should repair some breaks in the line; I helped him himself.

Q. Did he tell you where they were broken—where to go?

A. The first I recollect of, he had me go with him one night to lay down some wires on Union and 7th—Union and 6th or 7th, somewhere along there. I let down some wires, the first work I done, to let the house through. Well, I think, in a short time after that he came out one night and had me go with him and help put in some cross (?) on 9th and Howell streets, where their road and the Lake Union crosses. The old crossings on the trolley wire had been wood in the first place, and had broken out so bad, and he got some new ones. We went out and looked after a number of these breaks of the cross (?) on the wire insulators, and I think, with the exception of that, I maybe repaired the line in a place or two before this accident.

Q. What authority, if any, did you have to superintend the line?

A. None whatever.

Q. What authority, if any, of inspection did you have?

A. I never had any authority whatever.

Q. What authority did you have to erect any changes or anything of the kind in the line, if any?

A. I never had any authority.

Q. What were you doing out at this point on Stewart and Depot streets on the 15th day of June, 1893?

72 A. One of these trolley ears had broken off, and, when the ear broke off, the — swung back from the trolley so that it was not possible for the trolley to reach it, and every time a car would come along it would come off and the space was quite a distance between the ears, so that it was almost impossible for them to get a trolley that would reach the wire so they could pass over. Some of the men notified me that morning about it being off there, and also quite a little span had been broken on the curve, just around back of Mrs. Pontius' place, and one time a month or two before I spliced in a little piece of work there. Some of the motormen or conductors told me about this break that morning, and I went out there to repair it. I had to take the old ear—the ear wasn't broke, but it was the curve to it, where the span wire went in,

was broken off; so I had to take and unsolder that old ear and put a new one in its place.

Q. What do you know—what did you know, if anything, about there having been kinks in the trolley wire and the kinks having been pounded out?

A. I didn't know anything about the wire or the construction of it at all. I never was on the line when they were working, nor worked with them. I was kept very busy in the car barn.

Q. State whether or not your attention was ever called to that.

A. No, sir; never had.

Q. Now, what did you do with reference to repairing that place at the corner there at the church?

A. Well, as I stated, I took and unsoldered the old ear that was on it and cleaned the wire up and soldered another ear on, and in drawing the wire up with the blocks I got the wire close enough so that I got it to the end of the guy span wire in
73 the ear, and the man that was helping me there had hold of the blocks, pulling up on it to get it in proper position over the car when it broke. I was standing with my right hand to the trolley wire, my left to the span wire, in connecting them, and the man helping me stood on the opposite side, he standing with his left hand to the trolley wire, facing the pole and the block, and the trolley wire broke right outside the ear from my side, so that it would catch me in the face or neck, some way, the blocks or the rope—I couldn't say what pulled me off the car.

Q. What direction did you have from the company as to keeping separate your time that you worked upon this wire outside?

A. The auditor had notified me in turning in my time—I kept my own time and what the time was of the help I had in the barn and turned that in to the auditor—and some month or two previous to this he notified me to keep the time—that is, after I got doing this little repair work outside—to keep that time separate; that they wanted it separate from the barn time, and if I worked half an hour out on the road when I turned in the time to the superintendent I mentioned so much time on the road and the rest of the time I kept and turned in to the barn account.

Q. How was that? Why did they keep their accounts that way?

A. I couldn't say.

Q. You kept the exact time, whenever you would go out and repair the line, separate from when you were working in the barn?

A. Yes, sir.

Q. Who was it you took out with you?

A. Mr. Henry at that time.

74 Q. Do you remember where Mr. Denny was that day?

A. No, sir.

Q. What had he said to you about going out to repair the line where any repairs were needed to be made?

A. Why, I think that the superintendent had spoken to me some time or two a short time before that about doing this little job to save the company from keeping a lineman, and Mr. Denny told me that any time in the barn or anywhere that I needed any help, or had

to have any help, to take one of the relief boys or men that were working there for the company—there was five or six—four I think generally—relief men that worked there, that relieved the other men for their meals and so on, and of course they worked only from five to seven hours a day, and when I could use one of them for an hour or two, to use them to save taking in an outsider, and that particular morning there wasn't any relief man present, so I called on Mr. Henry, as he was then in the barn, and they were complaining about this car being off, the line being in such bad shape that it was almost impossible for them to get pass there without the car being fixed.

Q. How many times did Mr. Denny direct you to go out and make repairs?

A. Oh, at various times. He has went with me quite a number of times.

Q. What orders did he give you? That when anything was reported to you there to go out and fix it?

A. He said any time any little break like that occurred, to go out and fix it, or in case a car got off the track or anything I should go out and help the men to get it on.

Q. Did you frequently go out and help the men get the
75 car upon the track?

A. Yes, sir; quite often.

Q. Why was it necessary for you to go and help them get the car on the track?

A. As a general thing, the men didn't want to get their good clothes dirty, and they wanted somebody that could use a jackscrew and jack the cars up and get them on the track.

Q. So that it was part of your work, then; he told you to go out and help put the cars on the track, and whenever any little repair of that kind was needed on the track to go out and do that?

A. Yes, sir.

Q. Now you may state, as near as you can, to the jury what has been your condition since your injury?

A. Well, the first four months after my accident I knew but very little about my injury.

Q. You may state to the jury if you can use your limbs?

A. Yes; I can use them. I can move them a little.

Q. How—show them.

A. (Illustrating.) By moving them around that way, but I can't tell that I move them unless I look at them, the only way is.

Q. Can you move the other one?

A. Yes; I can move it.

Q. Can you stand upon them?

A. No, sir.

Q. Can you walk?

A. No, sir; I never will walk.

Q. Have you walked any since that time?

A. No, sir.

Q. What wages were you getting?

76 A. I was getting three dollars and a half a day for full time.

Q. How many days in the week did you work?

A. I worked every day.

Q. Every day?

A. I guess—I think I worked every day during the time I was there. I don't think I missed a day.

Q. You worked Sundays, too?

A. Yes, sir.

Q. Are you able to sit up all day at a time?

A. Well, I generally have to lie down once in the forenoon. I can sit up a little longer in the morning than afternoons. In the afternoon I generally have to lie down about twice an hour each time.

Q. How do you turn over when in bed?

A. I have got a rope over my bed that I use in my hands to turn over and get in and out of bed with.

Q. Explain to the jury how you have your bed constructed.

A. Well, just an ordinary bed, only at the head of it there is a partition. I have got a block nailed on there, and then a two-by-four lying on that, and at the foot of the bed there is a piece set in right over the bed; I guess about three feet, maybe four feet, above the bed; runs along, and from that I have a rope that swings right down over my body; that I take hold of with my hands and turn over and get in and out of bed with.

Q. State whether or not you have walked since the 15th day of June, 1893, when you received these injuries.

A. No, sir.

Q. State whether or not you are able to follow your usual avocation.

A. No, sir; I am not.

77 Q. Who was your physician?

A. Doctors Coe and Sharpless were the first physicians I called.

Q. Whom have you had since that time?

A. Jordan and Brooks.

Q. Who else, Dr. Patterson?

A. Dr. Patterson.

Q. How long have you had Dr. Patterson?

Mr. BAUSMAN: I will admit that the expenditures mentioned in your bill of particulars were made.

Mr. HUMPHRIES: That we spent a thousand dollars for physicians bills?

Mr. BAUSMAN: Yes, sir. I will admit that you made the expenditures alleged in the complaint.

Q. You may state to the jury whether you were given any authority by the company as superintendent of it or any time.

A. No, sir; none whatever.

Q. Which side of the wire were you upon at the time that it broke? You can show on this map or chart here, Exhibit No. 1.

A. I was on the outside of the curve, on what I would call the outside, on the span side of the curve of the trolley wire?

Q. Why did you stand on the span side?

A. When the car came off, the wire, of course, would swing back on a line between the next two spans, which would leave the trolley wire, I think, — was at that time; it was just so we could throw the rope over it to pull it back to get the hooks on. It would be impossible for me to get on that side until after the line was drawn back to the center of the car. The car I had to work off of, the top of it is narrow; has a narrow space just over the transoms at the
78 center of the car. I suppose that it is not over eighteen inches, maybe two feet, wide, and a space of maybe three feet that length between the base of the trolley and the break of the hood of the car to stand on the car, and it would be impossible to get on the other side of the trolley wire until after it was drawn back there within a foot of its proper place.

Q. As I understand you, the trolley wire, when in proper place, is right over the track when it is in proper place—over the center of the track?

A. Yes. Well, it is generally a little closer to the inside rail.

Q. But substantially over the center?

A. Yes; it should be near the center of the track.

Q. And the car that you worked upon, or the construction or repair car, is a car that runs on the rails on the track?

A. Yes, sir.

Q. And then you work from the top of that car?

A. Yes, sir.

Q. Now, if the wire was swung over away from the track your car would not reach on the other side?

A. No, sir; it would not.

Q. So that you stand upon the car right there and take hold of it and pull it back to the span wire. Is that the way of it?

A. Yes, sir.

Q. You may state to the jury, if you know, what caused your injury.

A. No, sir; I do not. It was possible that the fall caused it, but there was most of them under the impression that it was the shock.

Q. How long was it before you could move your legs at all?

79 A. Well, when I first recovered my right mind, in October some time, I could just wiggle my big toe. I think it was over a year before I could lift my foot—lift it off the floor.

Q. You may state to the jury whether it is possible to repair the wire and stand under it. Could you have stood clear under the wire and not abreast of it and drawn it in place?

A. I never had nor I never seen a lineman do it. It might be done, but I never saw it done.

Q. You never saw it done?

A. No, sir.

Q. Do you know about what place in the curve it was that it broke?

A. It was about the center of the curve after leaving the double track on Stewart street.

Q. How long have you been an electrician?

A. I started in with the street-car company in the fall of 1888. I worked some on the construction of the old Seattle Consolidated road in the winter of —, and during the spring the superintendent, the man who built the road, told me that he would give me the work in the barn just as soon as there was sufficient work, but he put me on the road as motorman, and I ran on the road, I think, until October. Since the October of 1889 I have been a car-repairer, and done that work.

Q. What effect would it have upon a No. 4 trolley wire, such as introduced in evidence here, to twist it half around and then pound it out straight?

A. Well, it would undoubtedly weaken it. It would weaken it still more if there was a strain on the wire.

Q. What do you mean by a strain?

A. The strain is the pull direct—endwise—on the wire.

80 Q. You may state to the jury, if you can, what sensation, if any, you have in your feet.

A. Well, that varies, I think, with the weather. There is days occasionally that I haven't very much pain—that is, very little except a prickling, numb sensation. Other days I have more severe pain, very severe pain, a drawing, cramping of the muscles.

Q. What difficulties do you have with your bowels?

A. Well, I have had difficulty with them all the time, ever since I was hurt.

Q. What do you know, if anything, of the sloughing of the mucous membrane?

A. Nothing whatever.

Q. You don't know anything of your own knowledge about that?

A. No, sir.

Q. Now, these gentlemen have spoken about your not bringing your suit against the company. I want to know why you did not bring a suit right away.

A. Well, first and foremost, as I said before, the first four or five months I knew nothing about the bringing of a suit or damages either, and after that I thought all the time they would come and allow me something, and kept giving them time.

Q. Did Mr. Denny ever call on you?

A. Well, both Mr. Dennys had called on me, I think.

Q. Mr. D. Thomas Denny?

A. Yes, sir.

Q. What did he say to you about what they would do for you?

A. He never said anything to me in regard to that.

Q. He did not say anything to you?

A. No.

81 Q. Mr. Remsberg has been your attorney all the time?

A. Yes, sir.

Q. And most of the conversations——

A. Were through him.

Q. And then he talked to you and they to him?
A. Yes, sir.

Mr. HUMPHRIES: That is all now.

Cross-examination.

(By Mr. BAUSMAN:)

Q. Mr. Dixon, did you ever present any bill to this company?
A. I don't know; it was in the hands of my attorney, and I don't know what he presented.
Q. Well, you know that he did not, don't you?
A. No; I don't know that he did not.
Q. You don't know that?
A. No, sir.
Q. Since when has Mr. Remsberg been your attorney?
A. Well, he commenced doing my business right away after I was hurt, looking after my business.
Q. What business do you mean?
A. I had some property that I was in debt on, and he looked after that, sold it, and transacted all the business that I had to do.
Q. You have a store out there, have you not?
A. I have a little cigar stand there now; yes.
Q. Have you any children?
A. No, sir.
Q. Now, why did you not direct Mr. Remsberg to bring suit in all these years that have gone by before the witnesses have disappeared?
A. Well, I can't say as to that; I left it with him.
82 Q. It was three years or very nearly—within a month or so of three years before you even brought suit?
A. I don't remember when the suit was brought.
Q. The injury was in June, 1893, and you brought suit in March or thereabouts. Mr. Stocks has gone to Alaska, has he not?
A. I think he went to Pittsburg.
Q. And Mr. Newall to Alaska?
A. Yes, sir; this last summer.
Q. So they could not be here and testify before the jury? Now did you ever ask Mr. Denny to pay you?
A. Myself?
Q. Yes.
A. No, sir.
Q. He came to see you, the Dennys did?
A. He came to see me when I was first hurt.
Q. And Mr. Winchell, the superintendent, also came to see you?
A. Yes; he called.
Q. When did you first talk to Judge Humphries about this case?
A. I don't recollect the exact time.

Mr. HUMPHRIES: Last week.

Q. To go back a little: You said, I believe, in your direct exam-

ination, that you went out there that day to this place, because one of the motormen told you there was a break in the line?

A. Well, I couldn't say whether it was a motorman or conductor that reported; some one of the men.

Q. But it was one of these?

A. One of the carmen—yes—told me.

Q. One of the carmen told you that there was something wrong in the line; with that you organized your little crew, so to

83 speak, and went out?

A. I got Mr. Henry.

Q. You took Mr. Henry. Now, this was on the 15th day of June, was it?

A. It was on the morning of the 15th; yes, sir.

Q. You spoke of a Mr. Stocks. Mr. Stocks, you say, had been in charge of the line up to the time he left?

A. No.

Q. Stocks?

A. He took charge of the work after Mr. Wolf quit.

Q. Mr. Stocks left in February, did he not? I thought you said in February.

A. No; it was later than that; some time along during the spring; I wouldn't say what date, but it was after the 15th of February, I know, on account of the big snow.

Q. That is to say, he left about four months before this accident?

A. Well, it was somewheres along two, three, or four months; somewheres along; I wouldn't be positive.

Q. But it was within that time, as you have already testified, that you would from time to time go out on the line and make these repairs?

A. I think that I made—I couldn't be positive how many times.

Q. You couldn't be positive how many times?

A. But, I think, most times I have went out was with Mr. Denny himself.

Q. Do you remember a man named Flindell?

A. Yes, sir.

Q. You went out with him sometimes, did you not?

84 A. Well, it is probable that Flindell went out and helped, because he was one of the leadmen.

Q. Mr. Denny, you said, had given you orders that you were to look after these repairs along the line and keep a separate account entirely of that?

A. I think Mr. Denny never gave me no orders.

Q. Mr. Winchell, perhaps, it was, then?

A. No.

Q. I thought you so stated?

A. No; the auditor asked that I should keep it—give in separate time—time outside—and turn it over to Mr. Winchell, the superintendent, and he turned that into the company. I took and turned in just what was done inside the car barn.

Q. It was not a matter of any importance to keep a separate account of the time at all. I simply want to know whether they told

you—gave you general orders. Mr. Denny or Mr. Winchell it was that told you, as you have already stated, to look after their repairs along the line there. Do you remember which one it was?

A. Mr. Denny had come down different times and asked me to go out with him evenings or nights, after the cars would stop, to make changes, and he had told me whenever there was a breakdown, or anything of that kind, to go and do it. That was all that I was to do.

Q. The Dennys broke up and lost all they had about the same time you had your misfortune, did they not?

Mr. HUMPHRIES: We object to that. What has that got to do with it?

The COURT: It is immaterial.

Mr. BAUSMAN: All right.

85 Q. Now, you state in your complaint here, Mr. Dixon, that at the time this accident occurred you were caught in the angle of a trolley wire and a span wire and thrown off the box and platform, where it was necessary for you to stand. What is that box like?

A. Well, from a regular passenger car—from the top of a regular passenger car there is a place in the line, some nineteen feet, I think, is the usual height for the trolley wire, and in some particular curves, when it swings high, the top of a regular passenger car wouldn't be high enough to reach the trolley wire and work on in soldering on the ears, and very frequently we would take a box—some dry-goods box, you know—anything that would be sixteen or eighteen inches high and as large as we could get—to set on top of the car for to reach this place to solder on the ears.

Q. You nail that box down to the car or just stand it on the car?

A. No; just stand it on the car.

Q. You say Mr. Remsberg has been your attorney for some considerable time?

A. Well, yes; he has attended to my business off and on since I have been hurt; yes, sir.

Q. You spoke about your property there. Do you own that cigar store?

A. Yes, sir.

Q. Do you own the house it is in?

A. No, sir.

Mr. BAUSMAN: That is all.

86 Redirect examination.

(By Mr. HUMPHRIES:)

Q. Have you any property—any property at all?

A. No property at all.

Q. How have you been supported?

A. I had some three hundred dollars coming to me from the company at the time I was hurt, and since that time, after that was

used up—it didn't last very long—two lodges that I belonged to have supported me up until the present time, or very near.

Q. What lodges?

A. Odd Fellows and Knights of Pythias.

Q. Mr. Bausman has asked you about this car. Who directed you to use that car when you used it?

A. Well——

Q. Under whose direction was it?

A. I couldn't say as it was under special direction from any one. It was the only means that we had to work by. When Mr. Denny would come down for me to go out to put up special work with him we used a passenger car, and it was used and had been used right along for that purpose.

Q. What other kind of car did they have?

A. Didn't have any other kind of construction car.

Mr. BAUSMAN: I object to this, your honor. The charge is here, so far as negligence is concerned, what relates to the wire——

Mr. HUMPHRIES: Pardon me, this is an examination as to the particular kind of a car.

Mr. BAUSMAN: That is admitted—what kind of car.

Mr. HUMPHRIES: But I have a right to find out. I want to show what kind of a car that was.

87 The COURT: Go ahead.

Q. Now, when Mr. Denny went with you to do these little repairs you may state if this was the same kind of contrivance you had to work upon.

A. Yes; the regular passenger car.

Q. With a box on top of it?

A. Yes, sir.

Q. That is all he furnished you to do this work with, is it?

A. That is all we had at that time; yes, sir.

Q. You didn't have any other kind?

A. Not at this time.

Q. The only family you have is your wife?

A. Yes, sir.

Mr. HUMPHRIES: That is all.

(Testimony of witness closed.)

88 Dr. W. M. PATTERSON, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

(By Mr. HUMPHRIES:)

Q. What is your occupation?

A. I am a physician.

Q. Where do you live?

A. At Fremont.

Q. How long have you lived there?

A. Something over three years.

Q. Do you know Samuel Dixon?
A. I do.
Q. How long have you known him?
A. Since August, I think, 1893.
Q. You may state if you have been his physician.
A. I have.
Q. State to the jury now, as near as you can remember, his condition.
A. It is a very difficult matter to state with certainty as regards a man's condition who has sustained such an injury as he has, because the whole matter at its seat is hidden and we only judge from appearances.
Q. Tell the jury what appearance it has.
A. He evidently sustained a severe injury of the spine, and has not sufficiently recovered so that he has the use of his feet to any extent. He can use his feet a little—can move them—and he suffers, evidently more or less, day after day with it, the trouble. Sometimes his sensations are prickling sensations—numb sensation, as people experience when they claim their feet are asleep or hands are asleep; you probably all know what that is. He com-
89 plains of that frequently, and sometimes he complains of a drawing sensation, especially at changes of the weather—a drawing sensation in his abdominal muscles here (indicating) and inside of his thighs, and sometimes at his calves. He makes—has made persistent efforts, along, to exercise his legs, to get control of them—has been doing that since he has been able to.
Q. He has a constant desire to try to walk, hasn't he?
A. Yes, sir; evidently a man has a desire to recover his faculties.
Q. Has he not despaired of trying to recover his?
A. Well, no; he has not despaired of trying.
Q. Go on and state further. Is he able to sit up long at a time?
A. Well, he usually sits up in the forenoon the bigger part of the time; perhaps he goes to bed for an hour or such a matter, owing to the way he feels, and sometimes longer and sometimes not so long. Then in the afternoon he has to go to bed again and rest. He is not able to sit up during the whole day very well; gets tired quickly.
Q. What tires him?
A. It seems to be the sitting up and the holding of his spine erect—seems to have that effect upon him, tires him. There is a very tender spot in his spine—has been, I am informed, since he was first hurt. I saw him, as I stated, I think in August. I went up—I think in August I was sent up to see him at the hospital, and he was in a very serious condition at that time, and I have seen him long before I began to treat him at all, at different times; sent by the lodges to see how he was getting along.
Q. You found, you say, that there was a very tender spot
90 in his spine?
A. Yes, sir.
Q. Now, Doctor, from your examination of him, can you

state to this jury whether or not, as a fact, he is permanently injured—disabled from the use of his limbs?

A. We don't know what may happen; we don't absolutely know anything; of course, that we don't know; we don't absolutely know what is in the future.

Q. I know, but your opinion from what you do know; what you see?

A. Why, it is my opinion that the man can never recover to that extent to put him back in the normal condition as he once was before he was injured. I do not believe that the man can ever recover permanently—that is, fully, I mean. I do not mean to say that he cannot to some extent improve in some ways, because we see in the past that he has improved some.

Q. Well, the improvement has been very slow, has it not?

A. Very slow; I should say so.

Q. There is really no telegraphic communication now between his head and his feet, is there?

A. The sensation is not—it is not normal—that is, he may have some sensation. He knows if you are doing something to his feet in a way, but the normal sensation is not there.

Q. And the motor power is not there?

A. Well, to some extent, but not in its primitive condition.

Q. You can tell without looking that you have moved your feet, can you not?

A. Oh, yes; certainly.

Q. He cannot, can he?

A. No; he doesn't have that sense. He may know—you
91 might perhaps prick him with a pin in his lower extremities and he might know that something is wrong, but cannot just exactly determine in what way. He may know he is being persecuted, and he might possibly—in those conditions sometimes a touch will seem a severe injury to them, from some excited condition or abnormal condition of the sensory impulses. The transmission some way—there is an exaggeration and sometimes it will seem to them that injuries are severe which are not injuries at all, and then again they do not sense severe injuries.

Q. You have been making a study of this case, have you not?

A. Well, he has been under my observation for some time, and every physician, I think, necessarily studies his case more or less.

Q. You have been studying his case especially to see what was the matter?

A. Yes, sir.

Q. And what could be the remedy?

A. Yes, sir.

Q. How did you get his feet so he could move them at all?

A. Nature did all of that, principally; nature performed the cure. Now, all the cure that can be performed in any way in a case of that kind almost always is by nature; nature does the work.

Q. You are applying electric batteries to his feet now?

A. Yes; he takes electric treatment some of the time and then intermits again. I made use of that treatment for the drawing

sensations of the muscles. I made use of that treatment to obtain some degree of relief in that way.

Q. You may state to the jury whether or not he is in such a condition that he can dress and undress himself.

92 A. No; he cannot do that without assistance.

Q. Can he wait on himself?

A. Why, if he should sit at the table he could wait upon himself and eat, because he has his faculties as regards his hands.

Q. I mean generally?

A. Why, no; he must have assistance.

Q. Is it not a fact that he has to be wheeled around the house just as he is wheeled around here before the jury?

A. Yes; certainly.

Q. And handled in the same way?

A. Yes; certainly.

Q. And when put into bed has to be wheeled to the side of the bed and pull himself in with a rope, or be lifted?

A. Yes, sir.

Q. You have seen that bed, have you not—the rope?

A. Yes, sir.

Q. How does he raise himself with that?

A. The bed has a brace over it running longitudinally—lengthwise—and a beam running over the center of the bed, and he grasps his rope. Of course, I have seen him a number of times help himself in bed by pulling himself up with the rope.

Mr. HUMPHRIES: That is all.

Cross-examination.

(By Mr. BAUSMAN:)

Q. You have been in charge since August of the year in which Mr. Dixon was hurt?

A. No, sir.

Q. I thought you stated August?

A. I stated to the jury that I thought it was in August,

93 1893, that I was sent by the lodge to see in what condition Mr. Dixon was, and did not state I was his physician at that time.

Q. You have made some progress with your patient, have you not?

A. Nature has made some progress.

Mr. BAUSMAN: That is all.

(It is admitted by counsel for defendant that the expectancy of life of a man thirty-five years of age is thirty-one and eight-tenths (31.8) years.)

Redirect examination.

(By Mr. HUMPHRIES:)

Q. There is one question I want to ask you, Doctor. You may state, from your examination and knowledge of this matter, what, if anything, caused this injury.

A. It was the fall, and consequent shock, together with the current of electricity passing through him. I think he received a shock of the current, and he evidently sustained an injury to his ribs when he fell, and I am informed that two of his ribs were broken. This I don't know to be so, because at the time I came to examine him I couldn't detect a callous there where the ribs were broken, but he was very tender up there in the region of the breast and 9th dorsal vertebra—9th and 10th dorsal vertebræ; 9th and 10th rib. He was very sensitive there, and I am informed that he had two ribs broken and severe inflam-ation of the lung at that time; supposed to be traumatic.

(On motion of counsel for defendant, all the testimony of the witness as to what he was informed is stricken out, without objection.)

Q. Do you know anything about the trouble he has had
94 with his boweles?

A. He has suffered a great deal from constirpation.

Q. Do you know anything about the passing of mucus?

A. Yes, sir.

Q. Something like the peeling off of the mucous membrane of his bowels?

A. It is a natural thing, common thing, for patients who suffer constantly from constirpation to pass mucus; that is a common thing.

Q. A peeling off of the mucous membrane?

A. The passing of mucus and the peeling off of the mucous membrane are two separate things. The passing of the mucous membrane could only take place in a case where by inflammation the mucous membrane had been loosened and sloughed off. Mucus is the natural and normal secretion of that membrane, and in excited conditions, such as arise in constirpation, from irritation, excessive mucus is discharged.

Q. You know nothing about the peeling off?

A. I have never discovered anything of that kind—the peeling off of the mucous membrane.

Mr. HUMPHRIES: That is all.

(Testimony of witness closed.)

95 —— REMSBERG, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

(By Mr. HUMPHRIES:)

Q. Mr Remsberg, you are one of the attorneys in this case?

A. I am.

Q. Are you acquainted with Mr. Dixon?
A. I am.
Q. How long have you known him?
A. I have known him about six years, I think.
Q. How long have you been his attorney in this case?
A. I was called to assist him particularly by being appointed a committee from two lodges to which he belonged, and from my acquaintance with him at that time I grew into doing certain little matters of business for him; since that time I think I have done more business for him than anybody else.
Q. You have been his attorney in this case from the beginning, have you?
A. I have.
Q. You have had control and management of it? Now, Mr. Bausman asked Mr. Dixon why this case was not brought sooner——

Mr. BAUSMAN: Object as immaterial.
Mr. HUMPHRIES: Of course, if he objects to it, we cannot explain it. I don't think it would be proper.
The COURT: I think it is immaterial. If it is brought within the statute of limitations, that is enough.

Q. Now, you may state what you know of the condition of Mr. Dixon from the first time you examined him down to the present time.
96 A. For several months after he was hurt he was entirely unconscious. He didn't seem to realize anything. The lodges of which he was a member stationed committees to watch him and attend to him nights. I don't know how long that was kept up. I went, off and on, a number of times.
Q. How frequently did you see him?
A. I saw him certainly once a week right along from the time he was hurt.
Q. You are a neighbor to him, are you not?
A. I am now. He did live across the lake, and I lived at Fremont. He lived this side of the lake when he was hurt, and I visited him there. Since then he has moved to Fremont, and since he has moved to Fremont I have seen him every day.
Q. What do you know about his ribs having been broken?
A. I do not know that his ribs are broken positively; only simply as they told me. I didn't examine his ribs.
Q. You do not know of your own knowledge?
A. I do not know of my own knowledge that his ribs were broken.
Q. What do you know about his power to get out and around?
A. I suppose it was several months before he sat up in bed. I don't know how long it was before he could get in bed; certainly a long time. I don't know how long it was, but I suppose it was a year before he could be carried out—that is, before he was carried outside of the door.
Q. Do you know who was superintendent of this railway and power company's line at the time of the accident?

A. I do not of my own knowledge.

Mr. HUMPHRIES: That is all.

Cross-examination.

(By Mr. BAUSMAN:)

Q. How did you say you became Mr. Dixon's attorney?

97 A. Well, from associations particularly.

Q. You knew him personally?

A. I was acquainted with him. He was a member of lodges to which I belonged, and I was rather intimate with him before he was hurt.

Q. Will you explain to the jury why you thought it necessary several times to mention his membership of lodges?

A. Simply because I was appointed a committee by the lodge to attend him.

Q. Yes. But you knew him independently of that, did you not?

A. My first acquaintance with Mr. Dixon was in the lodge.

Q. You knew him—lived out there near him, did you not?

A. I do now. He used to live over at Brooklyn. When he became a member of the lodge there he lived at Brooklyn there in the direction some place.

Mr. BAUSMAN: That is all.

(Testimony of witness closed.)

98 Mrs. S. B. DIXON, being first duly sworn, testified as follows:

(By Mr. HUMPHRIES:)

Q. What is your name?

A. Sarah Belle Dixon.

Q. You are the wife of the plaintiff in this case?

A. Yes, sir.

Q. How long have you been married?

A. Almost sixteen years. It will be sixteen years in March.

Q. How soon after your husband was hurt did you see him?

A. I seen him before noon. I couldn't say how soon, because I don't know exactly what time he was hurt.

Q. How long was he confined to his bed before he was able to be up at all?

A. It was something like two months before he ever sat up at all, and then it was just for a moment. He would have to lie right down.

Q. What, if anything, do you know about his ribs being broken?

A. I know the doctor said his ribs were broken——

The COURT: Don't state what the doctor said.

Q. You only know what they said at the time?

A. I know he suffered.

Q. State how he suffered.

A. He seemed to have pain. In moving him it would pain him.

Q. Where did he have his pain?

A. In one way was through his side, but we could hardly tell; it seemed to be every place almost.

Q. Did he have any pain in his back?

A. Yes, sir.

Q. What difficulty does he have in dressing and undressing himself?

A. He couldn't dress at all at that time.

99 Q. Was he as fleshy as he is now when he was hurt?

A. No, sir.

Q. Do you know about what he weighed at that time?

A. I think he weighed about a hundred and fifty-eight pounds.

Q. Do you know about what he weighs now?

A. Something over two hundred. The last time he was weighed he weighed two hundred and seven; I don't think he weighs quite so much now.

Q. He was rather a slender man at that time?

A. Yes; he was quite thin for him; thinner than usual.

Q. What kind of care and attention did he take?

A. It took a great deal.

Q. Explain. Did you have any extra help to wait on him?

A. Yes, sir.

Q. How many?

Mr. BAUSMAN: These were all admitted.

Mr. HUMPHRIES: I know you admitted the main expense, but you did not admit the number of nurses.

Mr. BAUSMAN: We have admitted all these details. I do not think it is relevant to go into it any further. We have admitted their whole bill of particulars.

The COURT: I think that ought to be satisfactory. He admits the whole bill of particulars.

Mr. HUMPHRIES: All right. We will submit it to the jury and withdraw the question. That is all I have to ask this witness.

Mr. BAUSMAN: That is all.

(Testimony of witness closed.)

100 Mr. HUMPHRIES: I understood the admission went to the pain and suffering in that paragraph. It is understood that you admit the pain and suffering and expenses?

Mr. BAUSMAN: Yes; I do not deny these things at all.

The COURT: The defendant expressly admits the pain and suffering charged in the complaint, then?

Mr. BAUSMAN: Yes; I admit that, your honor.

Plaintiff rests in chief.

Defendant moves for a nonsuit on the ground—

First, that no testimony whatever has been introduced to show that the receiver of the Rainier Power & Railway Co., Mr. Backus, ever employed, directly or indirectly, the plaintiff in this case, or that he retained while receiver any of the servants of the old com-

pany; that consequently no employment of plaintiff by the receiver, either directly or indirectly, has been shown.

Second. On the ground that it appears by plaintiff's own witnesses that the injuries which he received proceeded from his employment and his risks in that employment, which risks were incident thereto and ordinarily connected therewith.

Third. On the ground that it appears that the injuries which plaintiff received were such as his own foresight and the use of ordinary observation and diligence on his part could have avoided.

Fourth. On the ground that no negligence on the part of the defendant has been shown in this case.

Fifth. On the ground that no showing has been made by plaintiff that any reasonable precautions for the safety of plaintiff had been omitted by the defendant.

101 The COURT: The duty of the court in deciding matters of this kind is to consider, not only the testimony actually given, but also to take into account the reasonable inferences and deductions that the jury will draw from this testimony. It is probably unfortunate that the court is called upon to decide a proposition of this kind on a hurried argument, but it is the duty of the court to do so, and the court will discharge that duty.

The first objection is "That no testimony whatever has been introduced to show that the receiver of the Rainier Power & Railway Co., Mr. Backus, ever employed, directly or indirectly, the plaintiff in this case, or that he retained while receiver any of the servants of the old company; that consequently no employment of plaintiff, either directly or indirectly, has been shown."

The evidence, as the court remembers it, is that Mr. Backus was appointod receiver on the 13th of June, 1893. This accident occurred on the 15th of June, two days afterwards. The court is of the opinion that there is testimony here from which the jury could rightfully come to the conclusion that Mr. Backus did retain the old employees of the company and the officers of the company; hence the court is of the opinion that that point cannot be sustained.

The second ground is "That it appears by plaintiff's own witnesses that the injuries which he received proceeded from his employment and his risks in that employment, which risks were incident thereto and ordinarily connected therewith."

Now, the testimony shows, or at least there is some testimony from which the jury could reasonably draw the inference, as alleged in the complaint, that this man was employed as an elec-

102 trician and to repair the cars in the shop and to take care of and keep in order, I suppose, the electric machinery. There is some testimony tending to show, at least, that he was requested by one of the officers of the company to do certain ordinary repairs on the line, and if a car got off the track to assist in replacing that car. Now, evidence has been presented here tending to prove that allegation in the complaint. The principal employment of this man was as an electrician to repair the cars and the electrical machinery. Now, there is some evidence tending to prove that he went out to this place where the injury was received by having re-

ceived information that the trolley wire was loose from its place—those wires that held it in its proper position over the track. Now, the court is of the opinion that that principle of law which requires the employer to furnish reasonably safe appliances and machinery for its employees to work with is applicable here. In the discharge of that duty, he had no opportunity to examine that wire at all—to inspect that wire. He stood upon the top of that car upon a box which was on the car and applied pull*ies* which were attached to the trolley wire to bring it toward him, so that it would be perpendicular with the line of track, or nearly so, while he was to put on ears or to do something to that wire, but in bringing that wire to this position by the aid of these pulleys the wire broke, and he received this injury. Now, I think enough evidence has been given here to go to the jury on the question as to whether he was guilty of any negligence on that occasion, and also on the question as to whether he had any opportunity to examine the condition of that wire. If the wire was defective, and it was rendered defective by
103 the action of the company or those persons for whom the company was responsible in pounding out those kinks; if that knowledge—if the knowledge of these officers became the knowledge of the company, I do not think myself (at least, from this discussion) that even the discharge of the officers would take that knowledge from the company. I think the knowledge would remain in the company, whether the officer had been discharged or not; in other words, that a company could not avoid responsibility under these circumstances by simply discharging the officers after the company itself had been charged with notice. I give that simply in answer to the very plausible objection of counsel for defendant here as to the continuance of the employment of these men in the company.

The third ground is "That it appears from the evidence that the injuries which plaintiff received were such as his own foresight and the use of ordinary observation and diligence on his part could have avoided."

Now, there is evidence given upon that proposition suitable for the consideration of the jury. It is not proper for the court to take it from the jury.

The fourth ground of objection is "On the ground that no negligence on the part of defendant has been shown."

I think there is evidence introduced on that point from which a jury might draw the inference of negligence on the part of the company, based on this proposition: that while the company is not an absolute insurer of its employees, the company is bound to furnish safe appliances and machinery for the use of its workmen; and I believe that the general proposition is true that the degree of its diligence in that regard increases with the dangerous character of these appliances or machinery. So I do not think that objection is well taken.

104 The fifth objection is "On the ground that no showing has been made by plaintiff that any reasonable precautions for the safety of plaintiff had been omitted by the defendant."

That falls under the preceding proposition. If it was the duty of this company to furnish safe appliances for the use of its workmen, that alters the circumstances of the case. I think there is evidence enough here to go to the jury on this proposition.

Therefore I shall overrule this motion for nonsuit.

(To which ruling of the court defendant excepts, and exception is allowed.)

The jury, which had been excused and sent to the jury-room at the conclusion of plaintiff's case-in-chief, was now recalled.

105 *Defendant's Testimony.*

106 D. THOMAS DENNY, a witness called on behalf of defendant, being first duly sworn, testified as follows:

(By Mr. BAUSMAN:)

Q. Mr. Denny, state your age.

A. I am twenty-nine.

Q. You have lived in Seattle a long time?

A. Yes, sir.

Q. Were you ever at any time in the employment of the Rainier Power & Railway Co.?

A. Yes, sir.

Q. In what capacity?

A. As manager or general superintendent.

Q. When that company went into the hands of a receiver did you ever receive any appointment from Mr. Backus, the receiver?

A. Not at that time. Some three weeks afterwards I did; about three weeks afterwards.

Q. You had no authority from him on the 15th day of June, 1893, had you?

A. No, sir; I had not.

Q. Are you acquainted with the plaintiff in this case, Samuel Dixon?

A. Yes, sir.

Q. You knew him at the time of his injury?

A. I did.

Q. His injury was on the 15th day of June, 1893. Did you give him any special orders on that day to go out to do that work on Depot and Stewart streets?

A. I did not; no, sir.

Q. Did you know he was going out to do that work?

A. I did not.

107 Q. Were you surprised that he did go out to do that work?

A. No, sir.

Q. Was that his regular employment?

A. Yes, sir.

Mr. HUMPHRIES: I object to his leading the witness.

The COURT: He has answered.

Mr. HUMPHRIES: I move to strike out the answer as leading.

Mr. BAUSMAN: I withdraw the question. Strike it out. I will waive it.

The COURT: That will be stricken out.

Q. What position was Mr. Dixon in on or about the 15th of June, 1893?

A. He was what we call a barn foreman.

Q. What were his other duties?

A. Well, he done repairing on the trolley line where it was necessary.

Q. Do you remember a man by the name of Stocks?

A. Yes, sir.

Q. How long before had Stocks been with that company?

A. He had worked for the company some two years, I think.

Q. When had he left the company—about how long before this; several months?

Mr. HUMPHRIES: Don't lead him. Let him tell.

The COURT: I don't think that is badly leading at all.

A. Some two or three months; I can't say just when.

Q. Mr. Dixon said he left there about four months before. That is about correct, is it?

A. I should think so; yes, sir.

Q. What had been Stocks' position?

A. He was what we call a ground man.

108 Q. Went over the road?

A. Yes. He worked at setting poles and track-work—ballasting the track and such work as that—a common laborer.

Q. Mr. Stocks' duties involved, did they, taking care of the wires occasionally?

A. Yes, sir; they did at times.

Q. That was part of it; that was what you call overhead construction?

A. Yes, sir.

Q. That is, the trolley?

A. Yes, sir.

Q. And the span wires? Now, after Mr. Stocks left there did not that duty devolve upon Mr. Dixon?

A. Yes, sir.

Q. Do you remember the wire that you used there along the road?

A. Yes, sir.

Q. Do you remember the wire at Depot and Stewart streets; do you remember that wire?

A. Yes, sir.

Q. Where was that wire purchased?

A. From the General Electric Company.

Q. What is the General Electric Company?

A. It is a company that deals in electrical appliances, wire, etc.

Q. Is it one of the standard companies of the United States in that business?

A. It is.

Q. What was the weight of that wire? What number did that company give it or what designation did they give it?

109 A. That was No. 2.

Q. No. 2. How would No. 2 be as to No. 4? Would it be heavier or lighter than No. 4?

A. It was thicker.

Q. Thicker?

A. Larger—yes, sir.

Q. You have been in the street railway business for some years, have you not?

A. Yes, sir; I have.

Q. You are not in it now?

A. Not actively engaged in the operation of street railways—no, sir.

Q. Now, was that wire at that time, in your opinion, in reasonably safe condition for the operation of that road?

(Objected to by counsel for plaintiff as incompetent.)

The COURT: What is your objection?

Mr. HUMPHRIES: I will withdraw that objection.

Q. You may answer the question. Was it reasonably safe for the purposes for which it was used?

A. It was; yes, sir.

The COURT: That is, the trolley wire?

A. Yes, sir.

Q. Something was said, Mr. Denny, about the wire having been taken down there once to allow a house to pass under it. Does that necessarily weaken the wire?

A. It should not; no, sir.

Q. Do you think it weakened the wire?

A. Well, I couldn't say as to that. I don't think it did, though.

Q. This Mr. Dixon—did you consider him a competent man?

A. I did; yes, sir.

110 Q. Was he not a man whom you thought—to whom your company trusted with the business which he was given?

A. He was; yes, sir.

Q. You thought he was a man that could look after the trolley wires and span wires when required?

A. Yes, sir.

Q. Did he ever complain that he was sent out to do that kind of work?

A. Not to me—no, sir; not to my knowledge.

Q. You never heard of his complaining?

A. No, sir.

Q. Little breaks and little defects occurred along the line—frequently along the line, did they not?

A. Yes, sir; they did.

Q. Can you name any other person than Mr. Dixon who, after Mr. Stocks left the company, up to the time of this accident, had the business of looking after that, except Mr. Dixon?

A. No, sir.

Q. There was no other man, was there?
A. No other man; no, sir.
Q. And though he was in the barn also, was it not just as much part of his duties to be along the road after Mr. Stocks left—I mean when repairs were called for?
A. It was; yes, sir.
Q. What is the size of that wire marked "Plaintiff's Exhibit A" (showing)?
A. That is No. 0.
Q. No. 0?
A. Yes, sir.
Q. What is the size of this wire marked "Plaintiff's Exhibit B"?

111 A. I would call that a No. 4.
Q. No. 4?
A. Yes, sir.
Q. I believe you said that the wire out there was between these two?
A. It was; yes, sir.
Q. Did your road in its operation call for any unusual strain upon that No. 2 wire?
A. It did not.
Q. You were doing, were you not, a light business?
A. Yes, sir.
Q. Did so from the start?
A. Yes, sir.
Q. Did you see Mr. Dixon about there from time to time?
A. I did; yes, sir.
Q. Did he ever tell you that wire was bad at that point?
A. He did not.
Q. If there was any secret rottenness or interior defect in a wire, is that visible or is it not?
A. It is not generally; there are cases when it is.

Mr. BAUSMAN: I think that is all.

Cross-examination.

(By Mr. HUMPHRIES:)

Q. You say that you had no employment with Mr. Backus?
A. Not at that time; no, sir.
Q. What were you doing at that time?
A. I was at home, nursing a cold, just at that time.
Q. What did you have to do with the road?
A. At that time?
Q. Yes, sir.

112 A. Nothing.
Q. Just immediately before that, what were you doing?
A. I was acting as manager of the road.
Q. You were acting as manager of the road?
A. Yes.

Q. How long did you continue to act as manager of the road?
A. Up until the time Mr. Backus was appointed.
Q. Then who acted as manager?
A. A Mr. Clark.
Q. Mr. Clark was manager?
A. Yes, sir.
Q. For how long?
A. Well, I couldn't say just how long.
Q. When was Mr. Clark employed?
A. Some six or eight months previous to that, I think.
Q. Previous to what?
A. To the appointment of Mr. Backus.
Q. Mr. Clark was manager under you?
A. Not on that particular line; no, sir.
Q. Who was manager of this particular line?
A. I was.
Q. You were?
A. Yes, sir.
Q. When did you cease to be manager of this particular line?
A. The day that Mr. Backus was appointed.
Q. The day that he was appointed?
A. Yes, sir.
Q. When were you next employed as manager of it?
A. I was not again employed as manager of the road.
Q. What were you employed as?
113 A. As superintendent.
Q. Superintendent of the road? Now, where were you at the time Dixon was hurt?
A. I was at home.
Q. You had ceased two days before this, you say, to be manager?
A. Yes, sir.
Q. But up to that time you were manager?
A. Yes, sir.
Q. When did you become superintendent?
A. I don't know the exact time; some three weeks after Mr. Backus was appointed, I think.
Q. What was Mr. Winchell doing for you?
A. He was superintendent of the road under me.
Q. Under you?
A. Yes, sir.
Q. How long did — continue superintendent?
A. About a month, I think, after Mr. Backus was appointed.
Q. After Mr. Backus was appointed he continued. How long had he been your superintendent?
A. Since the road started.
Q. From the time the road was started until a month after Mr. Backus was appointed?
A. Yes, sir.
Q. Now, the same motormen, conductors, and employees were continued there, were they not, that you had—the first two or three days, at least?

A. I think they were; yes, sir.
Q. No changes made for two or three days?
A. Not that I remember of.
114 Q. Now, is it not a fact that you never turned the road over until two or three days after that; they took it, but you never formally settled up and turned it over; you kept charge for two or three days?
A. No, sir; I did not.
Q. Now, you say that Mr. Dixon was barn foreman?
A. Yes, sir.
Q. What do you mean by barn foreman?
A. The man that has general charge of the barn repairs of the cars and so on and repairing of the line.
Q. When was Wolf working for you?
A. I couldn't say just as what time; some six or eight months previous to that, I think.
Q. He worked for you after you accepted this road?
A. No, sir; I think not.
Q. How long did he work for you before Stocks worked for you?
A. Oh, he had worked for us some two years, I think.
Q. What was he doing?
A. Setting electric light poles.
Q. And what else?
A. Stringing the trolley wires and constructing the road-bed.
Q. What was Stocks doing for you?
A. He was working in the capacity of ground man or common laborer, digging the post-holes and so on.
Q. Wasn't he assisting to string the wire?
A. At times he was; yes, sir.
Q. At times? He was a line foreman part of the time, was he not?
A. No, sir.
Q. Who was the man that had charge of that?
A. Mr. Wolf had charge of it.
115 Q. Mr. Wolf had charge of it?
A. Yes, sir.
Q. And then when Mr. Wolf quit who had charge of it?
A. Mr. Winchell had charge of it then.
Q. Mr. Winchell had charge of it then?
A. Yes, sir.
Q. And of Alexander?
A. Yes, sir.
Q. And Burroughs and all these men that worked there?
A. I suppose, if they worked there afterwards. I don't remember whether they worked.
Q. He had charge of Dixon and all the men that worked there?
A. Yes, sir.
Q. Do you know a man by the name of McDonald who worked on the other line—the man that fixed up your rails for you one time? Three times you got McDonald.
A. McDonald—no, sir; I don't remember of it.

Q. Superintendent or manager of the light company. Do you remember a man by the name of McDonald?

A. No, sir; I do not.

Q. Didn't you have McDonald put the feeders on when you changed the power from the Western Mill to the Consolidated?

A. No, sir; I never had a man working for me by that name that I know of.

Q. Well, what was the man's name that did that?

A. I don't remember what his name was. I had several linemen to work at the time. I don't remember the names; perhaps never heard it.

116 Q. You had several men come and work for you, but you do not remember their names—what their names were?

A. No, sir.

Q. But you hired some specially to do that work, did you not?

A. It is possible that I did; I don't remember.

Q. You don't know who they were? Now, how often did Dixon go out to work upon the line?

A. Quite often. I don't remember just how often.

Q. How many times did you go with him?

A. I don't remember now but two particular times. He might have went oftener; I don't remember of but two.

Q. Do you recollect that you went twice?

A. Yes, sir.

Q. Where did you find Dixon when you wanted him that time?

A. He was at the car barn, I believe.

Q. Did you send him out at any other times?

A. I don't remember of any other particular time sending him out.

Q. Now, why did you say his duties were to repair the line when you never sent him out but twice and then you went with him?

A. It was the general understanding that he should do the light repairing on the line. I never sent him.

Q. What do you mean by light repairing?

A. Such as soldering on an ear when it came off, fixing on a span wire—anything that one or two men could do.

Q. That, then, was what you really had him to do; it was the light work?

A. Yes, sir.

Q. Such as soldering on an ear or fastening a span wire on
117 the trolley?

A. It was.

Mr. HUMPHRIES: That is all.

Redirect examination.

(By Mr. BAUSMAN:)

Q. You spoke of a Mr. Wolf, Mr. Denny. He was not working for the company in June, was he?

A. No, sir.

Q. The fact is, this man Wolf had worked, had he not, for Baker, the man who built the road?

A. Yes, sir.

Q. He was not in the employ of the Rainier Power & Railway Co.?

A. No, sir.

Mr. BAUSMAN: I think that is all.

Recross-examination.

(By Mr. HUMPHRIES:)

Q. Well, he was employed by you after he quit Baker, was he not?

A. No, sir; I think not.

Q. You never had Wolf in your employ?

A. Not after that—not that I remember of. He was appointed on the board of public works, and consequently had other employment.

Q. But how long had he been in your employ before that?

A. I couldn't say as to the exact time. It was something like two years.

Q. Now, is it not a fact that he was in your employ in the winter of 1892–'3?

Mr. BAUSMAN: State what you mean by "your employ." You get that mixed with Baker.

118 Mr. HUMPHRIES: No; Baker was the contractor who put up the road. He knows the difference.

Q. Now, is it not a fact that he was in your employ during the winter of 1892–'3, and remained in your employment until he got appointed on the board of public works?

A. I think he worked for me that winter, perhaps a week or more, during the heavy snowstorm.

Q. When did you accept the road from Baker?

A. I don't remember the exact date, but I think it was the latter part of February or first of March, 1892.

Q. Isn't it a fact that it was in 1892 this road was accepted—was finished—the fall of 1892?

A. Yes; it was in February or March, 1892.

Q. February or March, 1892?

A. Yes, sir.

Q. Well, then, in the winter of 1892–'3 he worked for you, did he not?

A. For about two weeks, I think.

Q. About two weeks he worked for you, and what was he doing at that time?

A. Cleaning snow off the track.

Q. Didn't he work for you at any other time between February, 1892, and February, 1893?

A. Not that I remember of; no, sir.

Q. You never sent for him to fix your track or wires or anything of the kind?

A. I think not.

Mr. HUMPHRIES: That is all.

Redirect examination.

(By Mr. BAUSMAN:)

119 Q. What was he doing there in the snow; just shoveling it off—this man Wolf?

A. Yes, sir.

Q. As a laborer?

A. No; he had charge of a crew of men.

Mr. BAUSMAN: That is all.

(Testimony of witness closed.)

120 G. S. WINCHELL, a witness called on behalf of defendant, being first duly sworn, testified as follows:

(By Mr. BAUSMAN:)

Q. Mr. Winchell, how long have you lived here in this city?

A. Since the spring of 1890.

Q. Are you engaged in the railway business at the present?

A. No, sir.

Q. Have you been for some time past?

A. No, sir.

Q. Were you ever in the employment of the Rainier Power & Railway Co.?

A. I was; yes.

Q. Do you remember the time it went into the hands of a receiver?

A. Yes, sir.

Q. Did Mr. Backus give you any appointment between the 13th and 15th of June, 1893?

A. No, sir.

Q. You simply acted on, not knowing what was happening; was that it?

A. I continued on until some time after the receiver was appointed; I think, a month.

Q. If you remember, when did you first hear that a receiver had been appointed?

A. I think a day or two after he was appointed.

Q. You don't know whether you heard it until after Dixon was hurt, do you?

A. I don't think I did until that morning.

Q. Had you orders from Mr. Backus or anybody representing him to act there?

121 A. No, sir; no, sir.

Q. Now, are you acquainted with the wire along the road?

A. Not very well; no, sir.

Q. Had your attention ever been called to any defects on Depot and Stewart streets?

A. No, sir.

Q. You didn't know of any?

A. I did not.

Q. Mr. Dixon had not told you of any?

A. No, sir.

Q. You remember Mr. Dixon, do you not?

A. Well, yes, sir.

Q. You remember also a Mr. Stocks, do you not?

A. Yes, sir.

Q. Mr. Dixon has testified that Mr. Stocks left the employment of the Rainier Power & Railway Co. about four months before Mr. Dixon was injured. Is that correct?

A. If my memory serves me right, I think it is. It is three or four months; something like that.

Q. Now, what had Stocks' business been while on the road?

A. He had been working as a lineman.

Q. Did that include repairing of the line?

A. Yes, sir.

Q. Now, after Mr. Stocks left and up to the time when Mr. Dixon was hurt, do you know anybody but Mr. Dixon that did that work?

A. Did the line work?

Q. Yes, sir.

A. No, sir; not on the line.

Q. Mr. Dixon did it, did he not?

A. Mr. Dixon—yes, sir—did all the work.

122 Q. He was out on the line from time to time, was he not?

A. Frequently there was little mishaps occurred, and we had for a while no one else; in fact, he was the only man we had to do that kind of work, and he usually did it.

Q. This Mr. Dixon you regarded as a competent man for that purpose, did you not?

A. Very; very competent, very skillful workman.

Q. And you would rely upon his work, would you not?

A. Yes, sir.

Q. Did he ever make complaint to you that he did that kind of work?

A. He never did.

Q. He would usually be found at the barn, would he not?

A. Yes, sir; usually at the barn; he was always——

Q. Any man who has work to do along the line and happens to be off any particular time naturally makes his headquarters at the barn, does he not?

A. Well, not always. They report there at certain hours.

Q. Report there at certain hours?

A. Yes, sir.

Q. If a man started out to work along the road he would naturally start from the barn, would he not?

A. Yes, certainly.

Q. That is the general place where orders and the like would be received?

A. Yes, sir.

Q. Did you give Mr. Dixon special orders that day to go out and do this work?

A. That morning?

Q. Yes, sir.

123 A. No, sir; I wasn't there.

Q. Did you see Mr. Dixon after this accident?

A. A very few moments afterwards.

Q. Did you see him later on, since that time?

A. Yes, sir.

Q. Did he ever present any bill to you?

A. No, sir.

Q. He states that the company paid him some three hundred dollars afterwards of back pay. Do you know whether he got any—made any account there of this—made any claim against the company? You don't know of his making any claim against the company, do you?

A. No, sir.

Q. It is not an unusual thing, is it, for the wire to break?

A. Well, the trolley wire doesn't frequently break. The span wires often break.

Q. You say they do frequently break?

A. Not often, the trolley wire doesn't. The span wires or ears get knocked off.

Q. Wherever there is a strain put upon the wire, there is a chance of its breaking?

A. Yes; especially in a curve that way—a heavy strain.

Q. What was the weight of the wire there; do you remember?

A. The size of the wire?

Q. The size; yes.

A. I believe it was called No. 4, or between that and the next size larger. I think it was called No. 4. I am not very well versed in that.

Q. It might also have been No. 2?

A. Yes. I think it was between No. 0 and No. 2.

124 Q. Between No. 0 and No. 4, you mean?

A. Yes; No. 0 and No. 4. I am not very well versed in the sizes of the wire, and I don't know what it was.

Mr. BAUSMAN: That is all.

Cross-examination.

(By Mr. HUMPHRIES:)

Q. You were superintendent of this line?

A. Yes, sir.

Q. How long were you superintendent?

A. From the time that the road started—that is, the short line.

Q. And when Backus was appointed you just continued right along as superintendent, did you not?

A. I did; yes.

Q. Why didn't you quit when he was appointed?

A. I had no instructions to quit—no orders; in fact, there was no change made.

Q. No change made?

A. No.

Q. And Mr. Denny continued right along there too?

A. Mr. Denny; no, sir. I think Mr. Denny had quit work a few days before that, or about the time that the receiver was appointed.

Q. He was laid up with a sore throat?

A. I don't know.

Q. Nursing a cold or something of the kind?

A. He was not present, I know.

Q. The fact about it is, there was no change there, was there?

A. I don't know in regard to that, positively.

125 Q. Were you superintendent?

A. I was superintendent at the time.

Q. Had charge of everything?

A. I had charge of the men; yes, sir.

Q. And you continued right along, and all the men continued?

A. Yes, sir.

Q. And the receiver paid them for that time, did he not—paid you and the balance after that?

A. He paid me. I don't know in regard to the balance of them.

Q. What objection did he make that you were not employed, when you came to get your pay?

A. He didn't make any objection.

Q. No objection at all—just went right ahead? Now, you say that Dixon was barn foreman?

A. He just continued to be barn foreman.

Q. He continued to be barn foreman?

A. Yes, sir.

Q. He was a car-repairer, was he not?

A. Well, electrician.

Q. Electrician about the cars—car electrician; and now, how often did he go out on the line to make little repairs, as you say?

A. I couldn't say how often; quite frequently. When any little mishap occurred he would go out and attend to it.

Q. He would go out and help put the cars on the track, would he not?

A. Yes, sir.

Q. Did you send him out to do these things?

A. I might have, sometimes. I don't remember about that.

Q. You say he was a good hand to do these little repairs?

126 A. Yes; a good hand, generally.

Q. And when a span wire got loose from the trolley wire or a car got off the track you would send him out to fix them up and solder them on?

A. Well, he, whenever it was reported to him—I think he generally looked after them, anyway, whether I was there or not.

Q. That was with your knowledge and consent, was it not, that he did that?

A. With my knowledge, and sometimes——

Q. And consent other times?

A. He was considered——

Q. The fact was he was the only man you had to do these things without you got somebody outside?

A. I always considered it part of his duties; in fact, it was so looked upon, and he was thoroughly competent in that direction; in fact, the only competent man and most competent man we had on the whole line to do that class of work.

Q. How long did Wolf continue there?

A. Wolf—I don't remember in regard to that—what time Wolf did leave the employ of the company. He was not in the employ of the company at the time this accident occurred.

Q. No; he was on the board of public works then.

A. Yes, sir; I think he was a long time before that, I am satisfied.

Q. When Wolf was there Wolf did the line-repairing, did he not?

A. Not always. You see, there were three departments—the power department, railway department, and light department.

Q. Yes, sir.

A. Well, this railway department was separate, and unless
127 there was some especially heavy work to do the regular linemen were not called on.

Q. Now, when Wolf was there he was known as one of the regular linemen of the company, was he not?

A. Yes, sir.

Q. And whenever there was any heavy work to do, why, Wolf was called on with his force to do that work, was he not?

A. Well, the fact of the business is we never had any heavy work to do particularly from the time the road was put up. It was new, and it was most all small repairs, and I don't remember of Mr. Wolf being called on with his men; he might have been; I don't remember.

Q. Was Wolf working on what is known as the line department; is that what he worked at?

A. Well, he was putting up new lines, as I understand it, a good deal of the time—that is, after the first work on the old road.

Q. Is it not a fact that Wolf stayed with the company until about three months before this injury—that is, through the winter and fall of 1892 and the winter of 1893—along there he was with the company?

A. No; I think longer——

Q. Say, five months before this road went into the hands of a receiver?

A. I don't remember Mr. Wolf being in the employ of the company for a long time previous to this accident, with the exception of a short time, I think, in February, that we had the big snow-

storm here—large snowstorm. Mr. Wolf had a crew of men that time helping us clean up the tracks. We were blockaded.

Q. What is meant by being superintendent of this line?

128 A. Well, I had charge of the men and the running department of the road and all the men employed.

Q. What do you mean?

A. Under Mr. Denny. Mr. Denny was general manager of the road.

Q. What do you mean by general manager?

A. He had general management of the road and looked after the outside affairs in general, and I was working under him at the time.

Q. In other words, he was general manager of the whole thing?

A. Yes, sir.

Q. And then you were superintendent?

A. Only of the railway department.

Q. Of the railway department?

A. Yes, sir.

Q. And there is the electric light department attached to the thing, too, was there not?

A. Electric light and power.

Q. And power and everything of that kind? You had charge of the running department of the linemen and everything connected with it there?

A. Yes, sir.

Q. Then, was Dixon under you or under Denny?

A. Well, he was under me and I was under Denny.

Q. You were under Denny and Dixon was under you?

A. Yes, sir.

Q. Did you employ Dixon originally or did Denny employ him?

A. Denny employed him originally. There a certain number of us were originally employed by Mr. Denny—five or six.

Q. And he was one of the men that were originally employed by Denny?

129 A. Yes, sir.

Q. When you first went there, why Dixon didn't do anything but car-repairing, did he, and barn-work?

A. Well, he did the same work—this kind of work always—when there was any to be done. Of course, it was a new line—nothing to speak of; it was a new line.

Q. You don't know of any time that Dixon worked on the line except two times that he went with Denny to help him to move the line to let the house through, and another time he went up and fixed something one evening, and then a couple of times he went out and soldered the ears on the line where the span wire had got loose from the trolley wire; isn't that about the fact?

A. Repeat that question.

Q. I say, you don't know of but four or five times that he went out to work on the line, do you?

A. Oh, yes, yes.

Q. What?

A. Yes, sir.
Q. What was he doing?
A. I can mention a number of times. At one time he went over and cut in, I remember, and tapped the trolley line—feed-wire. The power was a little scant and he tapped in feeders from the feed-wire.
Q. Hitched the feed-wires to the trolley wire?
A. Yes, sir; and at other times——
Q. Mr. Bausman asked you if it is often that a trolley wire breaks. I believe you said it was seldom a trolley wire broke?
A. Yes, sir.
130 Q. It is span wire generally?
A. Yes, sir.
Q. Who helped Dixon when he was putting feed-wires onto the trolley wire?
A. I don't remember who did help him; one of the boys, I think, on the line; one of the motormen.
Q. Do you know a man by the name of O'Donnel, an electrician—lineman of some kind?
A. I think I do; yes, sir.
Q. Now, is it not a fact that O'Donnel was the man that was doing that work and had charge of it, and Dixon was sent along to help him?
A. I don't remember in regard to that. I think Dixon had charge of it; I think so; I don't remember about that.
Q. Now, putting in that spurr at the wood yard, on 8th street; didn't O'Donnel have charge of that?
A. Putting in the spurr?
Q. Yes, sir.
A. No, sir.
Q. Who did?
A. Mr. Dixon and I did that mostly.
Q. You and Dixon did that?
A. Yes, sir.
Q. Was O'Donnel there?
A. I don't remember that he was.
Q. Who was O'Donnel?
A. He was a lineman, if I remember rightly. He was in the employ of the railroad company at one time.
Q. Did you ever employ O'Donnel?
A. No, sir.
131 Q. You don't know what department he had charge of?
A. O'Donnel; I don't know; I don't know that he had charge of any.
Q. Whenever they wanted extra work there they would have O'Donnel from some other place, wouldn't they?
A. Not that I know of.
Q. O'Donnel did help Dixon put in those feed-wires?
A. He might have; I don't remember.
Q. You don't know that he did not?
A. I don't remember in regard to it, but I helped Dixon. I used to go out frequently with him occasionally, and I know we put in

a little switch on the Ravenna Park line one time, Mr. Dixon and I—all these little repairs.

Q. Who did that?

A. Mr. Dixon did that.

Q. And O'Donnel and you?

A. No, sir; Mr. Dixon and I did it.

Q. So you — sent out to superintend that yourself?

A. Not necessarily; no; I knew very little about that work. I relied on Mr. Dixon's skill.

Q. That is, you relied on his skill and judgment and went there as manager? That is all.

Redirect examination.

(By Mr. BAUSMAN:)

Q. Now, the fact is, after all this attempt to break you down, that between the time that Stocks left——

Mr. HUMPHRIES: I object; there is no attempt to break him down.

The COURT: Never mind. Ask the question.

Q. Now, Mr. Winchell, the fact is that from the time
132 Stocks left there until Mr. Dixon was hurt, Mr. Dixon was the man that the company relied upon to do the line repairing along the trolleys?

A. He always did it.

Q. He always did it, did he not?

A. Yes, sir.

Mr. BAUSMAN: That is all.

Recross-examination.

(By Mr. HUMPHRIES:)

Q. Now, you testified, did you not, that he was to do the light-work—light repairs. What did you mean by that?

A. Well, such as putting on ears, repairing span wires. Sometimes the trolley would fall and break a span wire; knock off an ear or something of that kind. Mr. Dixon would usually take charge of it.

Q. What do you know about Stocks and his gang of men changing some wire on 3rd street just before Dixon was hurt?

Mr. BAUSMAN: I object unless he states the place at which it was done.

A. I say on 3rd street, just a while before——

Mr. BAUSMAN: I object to this unless he names the time and place. It is not cross-examination, at all events.

Q. On 3rd street, just before the day of this injury in 1893, did not Stocks and his gang change some lines on 3rd street, just above the city hall, for the Yesler estate?

A. I don't remember.
Q. You do not remember that?
A. No, sir.
Q. If he did that you don't remember?
A. No, sir.

(Testimony of witness closed.)

133 D. T. DENNY, a witness called on behalf of defendant, being first duly sworn, testified as follows:

(By Mr. BAUSMAN:)

Q. Mr. Denny, were you at one time connected with the Rainier Power & Railway Co.?
A. Yes, sir.
Q. In what capacity?
A. As president of the company.
Q. That was up to the time the company failed and went bankrupt?
A. Yes, sir.
Q. Do you remember Mr. Dixon, the plaintiff in this case?
A. I do.
Q. Do you remember of him, say between the middle of February, 1893, and the middle of June, 1893?
A. Yes, sir. My recollection is this: that we had him under our employ almost continuously from the time we started the road until he was hurt.
Q. Did he ever do any line-work?
A. That is something I don't know anything about personally—what he did inside or outside.
Q. You were not an active officer of the company?
A. No, sir.
Q. Nominally president, were you?
A. I was president, but I was not in charge of it.

Mr. BAUSMAN: That is all.

(Testimony of witness closed.)

134 SAMUEL L. SHUFFLETON, a witness called on behalf of defendant, being first duly sworn, testified as follows:

(By Mr. BAUSMAN:)

Q. State your name.
A. Samuel L. Shuffleton.
Q. How old are you?
A. Thirty-three.
Q. What is your business?
A. Electrician and superintendent of street railways.
Q. You are an electrician by profession, are you, and business?
A. Yes, sir.

Q. Have you any recollection of any of the wire on what was formerly the Rainier Power & Railway Co.'s line?

A. No, sir.

Q. You do not recall any of that wire?

A. The only experience I had with that railway was a short time I operated cars on it, through one portion of it—the portion of it south of 5th and Union streets.

Q. Do you recollect what wire was in use on that road at the time?

A. I did. I operated cars on it. At the time I operated cars on it there was the ordinary trolley wire of that system, No. 2, B. & S. gauge.

Q. You are acquainted with the strength usually of trolley wires, are you?

A. Yes, sir.

Q. Is a No. 2 and No. 4 wire sufficient wire for the purposes of a trolley?

A. I would consider No. 2 to be.

Q. You would consider that a reasonably safe wire?

135 A. Yes, sir.

Q. Have you ever seen men repair trolley or span wires by the use of block and tackle?

A. Yes, sir.

Q. Is it a necessity to stand on a car when you do that?

A. No, sir; it is merely a convenience.

Q. How can the strain be applied?

A. Why, blocks can be set under the wires, and by extending the rope a little you can draw the wire ever and stand down on the ground.

Q. The fact is, one can stand on the ground and tighten the wire up to the requisite point?

A. Yes, sir.

Q. Then he can ascend the car and do the repairing, can he?

A. Yes, sir.

Q. In any event, would it be necessary to stand on a box on top of the car?

A. To tighten the wire; no, sir.

Q. Even if it were necessary to get up higher than the ground, one could still stand on top of the car, couldn't one?

A. Yes, sir.

Q. But when one would stand on the box he then puts himself in a position where, if the wire breaks, he is certain to be hit by it if it comes his way?

A. Yes; certainly, if it comes his way—a position of very considerable peril.

Q. A man who stands on a box and applies the strain to a wire on a curve takes his chances, does he not?

Mr. HUMPHRIES: I object to that as leading.

The COURT: It is leading.

136 Q. You stated that it was not necessary in any event to stand on top of the box.

A. Not while the strain is being applied to the wire.

Q. Is there not danger when you do so?

A. That depends on conditions. If you are in a position where if anything should break—the trolley wire or span wire should break, or your block should slip, it would throw you off the car. It is a position of considerable peril, undoubtedly.

Q. It is more perilous to stand on a box than it would be on the car, is it not?

A. Decidedly so.

Q. Especially if the box is not fastened at all to the top of the car?

A. Particularly so.

Q. Now, a witness here, Mr. Alexander, stated that it would be better to stand under the wire. Do you agree with him?

A. Yes, sir.

Mr. BAUSMAN: That is all.

Cross-examination.

(By Mr. HUMPHRIES:)

Q. Is that the usual way you do?

A. Is what the usual way I do?

Q. Stand on the ground and draw the wire—the trolley wire—up to the span wire.

A. In the majority of cases of repairing a break in the wire there is no particular peril, because you are not in amongst the span wires. In those cases they stand on top of the car.

Q. That is the ordinary way, is it not?

A. That is the ordinary way.

137 Q. It is an unusual thing for a trolley wire to break, is it not?

A. No, sir; it is not unusual; it is quite common, quite frequent.

Q. Quite frequent that a trolley wire breaks?

A. It is quite common for a trolley wire to break.

Q. You would break a No. 0 wire just pulling it up to a span wire?

A. In the operation of an ordinary railway there is a great number of trolleys passing over the wire every day. Now, each one of these trolleys in passing over the wire moves it. Each trolley in coming along presses on the wire and raises the wire. Little by little that wire is worked up by that operation. A wire is something that gradually crystallizes itself just as you take a piece of wire in your hands and bend it back and forth until it breaks. There comes a time with that wire when it will stand it no longer and it breaks. It frequently breaks by itself.

Q. When you see a wire of that kind you take it down, do you not?

A. Such a wire as I speak of the crystallizing effect is invisible

to any man's eye. It is in the body of the wire itself. It cannot be seen until after that wire is broken.

Q. How long ought a trolley wire be used, generally, before it would get worn out?

A. That is a question that depends altogether on the circumstances.

Q. The ordinary wire?

A. Conditions vary so. It would depend altogether on the putting up of the wire, how it had been kept, and how many
138 cars passed every day.

Q. Say on the Third Street line?

A. I had nothing to do with the operation of the Third Street line.

Q. On the Consolidated road on Second street, the way they have run, how long will a trolley wire last?

A. I would think about seven years would be considered a good life for a trolley, but during that time we would expect it to break a number of times.

Q. Seven years?

A. Yes, sir.

Q. How many times have you known them to get a new wire on the Consolidated?

A. My connection with the Consolidated began a little less than two years ago.

Q. I believe you have the same trolley wire there they had always?

A. With the exception of a few curves they have renewed.

Q. The same trolley wire they started with on that road?

A. It has been there since I have been there.

Mr. HUMPHRIES: That is all.

(Testimony of witness closed.)

139 W. J. GRAMBS, a witness called on behalf of defendant, being first duly sworn, testified as follows:

(By Mr. BAUSMAN:)

Q. Mr. Grambs, what is your business?

A. I am manager of street railways.

Q. Have you any acquaintance with electricity?

A. I have.

Q. You have made more or less of a study of it?

A. I have.

Q. I will ask you whether you would consider a No. 2 or a No. 2 wire a reasonably safe wire for the operation of an electric street railroad in this city as conditions are here.

A. I would.

Q. Now, if the wire wears out or becomes defective through wear, is such a defect visible to the eye?

A. It is not, unless minutely inspected.

Q. How long do you think a wire ought to last?

A. It depends on the amount of traffic on the road.

Q. How long do you think a wire ought to have lasted on what is called the 3rd Street line, formerly the Rainier Power & Railway Co.'s line, as its traffic existed between 1891, when it was built, and 1893?

A. It ought to last ten years.

Q. They carried no particularly heavy loads, did they?

A. I don't think so.

Q. If the wire should become defective, whose duty would it be, in street-railway matters, to report such a defect?

A. It would be the duty of the person who was supposed

140 to repair the line.

Q. As men were employed then in this city and as men have been employed in this city on street railways for several years back, would it not be the duty of the man that was called upon to make the repairs along the line of the trolley and span wires to see and report such defects?

A. We look to that man to report defects of that kind.

Q. You understand how a repair is made on the trolley or how the span wire which has broken loose from the trolley is connected with it?

A. I do.

Q. They use block and tackle?

A. On curves.

Q. Can that tension or strain by means of block and tackle be applied from the ground?

A. Very readily.

Q. Very readily, you say?

A. Yes, sir.

Q. As a matter of fact, the men do get on the cars to do it frequently?

A. Not always—that is, in construction work, I have seen men stand on the ground. Very frequently they do get on the cars.

Q. Is the position on the ground less dangerous than the position on the cars?

A. Yes, sir.

Q. Standing below and standing under the wire than beside it?

A. You probably could work to better advantage there.

Q. It would be very dangerous, would it not, to apply that strain from the top of a car—more dangerous than it would from the ground?

141 A. It would, decidedly.

Q. It would be still more dangerous to apply it from a box, would it not?

A. Decidedly.

Q. It would be still more dangerous if that box were a loose box, would it not?

A. It would.

Q. Does the temporary letting down of a wire for the removal of a building weaken it?

A. It does not.

Mr. BAUSMAN: That is all.

Cross-examination.

(By Mr. HUMPHRIES:)

Q. You say that the wire on the 3rd Street line, with the use it was put to there, ought to last ten years?
A. I do.
Q. Now, you are the manager of the 3rd Street line, are you not?
A. At present.
Q. At present?
A. Yes, sir.
Q. You operate that in connection with your other lines?
A. I do not.
Q. You are manager of the Consolidated, too, are you not?
A. I am not.
Q. You are manager of the Grant Street line?
A. I am receiver.
Q. You are manager, too, are you not? You manage—you are manager and receiver—you are the official receiver and you are your own manager?
A. I am.
142 Q. Now, do you have any man in your employ that takes charge of the line?
A. I do not; the car-barn man does it.
Q. What?
A. The car-barn man does it.
Q. Who does the inspecting for you?
A. The car-barn man.
Q. You send him out to inspect the wires?
A. It is his business to keep the line up.
Q. That is the business you have him do?
A. I hold him responsible for that.
Q. Do you tell him that?
A. I place him in charge of the whole property.
Q. You place your car-barn man in charge of the property?
A. Yes—well, not—I place him in charge of all the repair work, cars, motors, and linemen or trackmen.
Q. Have you got a man in charge of the 3rd Street road now?
A. I have the car-barn man.
Q. You put him in charge of the whole line?
A. I do.
Q. He is the man to go out and go along the line and look at it and examine it and keep it in repair?
A. Yes, sir; it is his business to do so.
Q. That is, you make it his business; you have made that specially his business to do it?
A. No; it is his business. I don't tell him particularly to do hat.

Q. You have given him charge of that—hold him accountable for it?

A. Yes, sir.

143 Q. Mr. Bausman asked you if the usual way of drawing the trolley wire up with the span wire was to stand on the ground, and you answered him that you had seen them do that in the construction of the road.

A. I did.

Q. Now, after the road is constructed, the usual way is to go out with their repair car and put on their blocks and pull the trolley wire up to the span wire, is it not?

A. I would not say that is the usual way. That is a matter left to the discretion of the man who does the work.

Q. That is the way they do, anyway?

A. I don't know that they always do it that way.

Q. How would you go about it? Suppose it was eighteen or nineteen feet from the ground, without going up on the car and pulling it up, how would you work your apparatus?

A. You would have to get up on the car and fasten the tackle and let the end of the rope drop down, and get down off the car for the purpose of hauling the wire over.

Q. Get up there and fasten it, and then climb down and pull it over, and then get up again and fasten it?

A. That is right.

Q. That is, a man could do that?

A. Yes; fasten the ear.

Q. A man could do that in that way and keep out of the way of the wire?

A. If he thought it was dangerous it would be the proper way for him to do.

Q. That is not the usual way, is it?

A. I don't know that it is the usual way; it is done.

Mr. HUMPHRIES: That is all.

144 Redirect examination.

(By Mr. BAUSMAN:)

Q. That is to say, if a man wants to avoid danger he will do i that way?

A. Correct.

Q. He gets down off the car to apply the strain and then gets up on the car to fasten it?

A. That is the idea.

Mr. BAUSMAN: That is all.

Recross-examination.

(By Mr. HUMPHRIES:)

Q. Suppose he gets it pulled up that way, then when he gets upon the car and solders it; it breaks while he is on there—how is he going to avoid its knocking him off?

A. Well, the chances are it would break while he was exerting the strain.

Q. Suppose it didn't.

A. Well, I am not supposing at all.

Mr. BAUSMAN: I object to that as irrelevant. They do not claim it broke after that.

The COURT (after examination of the pleadings): I think the pleadings show—at least I should infer from the pleadings that this breakage took place while they were putting the strain on by the use of the tackle. I think that is a fair construction of the pleadings.

Mr. HUMPHRIES: All right. That is all. I withdraw the question.

(Testimony of witness closed.)

145 W. J. GRAMBS, recalled, testified as follows:

(By Mr. BAUSMAN:)

Q. I want you to show to the jury here on this plat how the block and tackle was connected for the purpose of drawing the trolley wire back. The repair work in this case would be that which would be caused if one of these span wires which supported the trolley got detached, broken off from the ear which connects on with the trolley. What is the ordinary proceeding there?

A. Well, I would take a tackle on the span wire and one on the trolley wire to pull it over from the straight position. Of course naturally when that pull-off wire is not there the wire is in a straight line.

Q. If you just step down here you can see it better.

A. (Indicating on plat.) I think with a pencil I can show them to a little better advantage. To start with, this trolley wire without these pull-off brackets would be a straight line. Now, for the purpose of getting the curvature of the track we use the pull-off wires, and the pull-off wires are secured to the trolley wire by a hanger, an insulated hanger. For the purpose of getting that wire over into position we take a block and tackle and make the block fast to the pole here with another one on the wire, and pull that wire over to the position that we want to secure it in. The rope would naturally come from here (indicating), run through this pulley, go back through that pulley and down to the ground, and the man would stand at the pole and haul on the rope. After that wire was brought to the position of curvature, the trolley hanger would be soldered on.

Q. This line you draw with your pencil, that would be shorter
146 in proportion as to which particular span wire it was that had dropped off?

A. Exactly.

Q. Now, this block can be fastened also to one span wire?

A. It can be fastened to the span wire.

Q. The span wire that has not fallen?

A. No, sir; it would be fastened to the span wire that had fallen.
Q. And pulled that way?
A. That is the idea.

Mr. BAUSMAN: That is all.

(Testimony of witness closed.)

147 J. R. OAKLEY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

(By Mr. BAUSMAN:)

Q. Mr. Oakley, how long have you lived in Seattle?
A. Seven years.
Q. What is your age?
A. Thirty-four.
Q. What business are you in?
A. I am foreman for the Seattle Traction Company.
Q. That is what is known as the Second Street line?
A. Yes; the successor to the Seattle Consolidated.
Q. You are foreman?
A. Yes, sir.
Q. You are around the car barn a good deal, are you?
A. Yes, sir.
Q. Now tell this jury what the duties of a car-barn foreman involve in street railways as they are operated in the city of Seattle.
A. They include the taking care of the repairs of all the cars; also taking care and charge of the repairs in the line-work on the outside; sometimes includes a little track-work.
Q. It is their duty to look after that, is it?
A. Yes, sir.
Q. They don't have any special orders to do it, either, do they?
A. No, sir.
Q. If anything goes wrong in the line and you hear of it, or any barn foreman would hear of it in the city of Seattle, is it not his duty to go at once and repair it?
A. Yes, sir.

148 Q. Now, have you ever seen trolley lines repaired by taking up the span wires and connecting them with the trolley?
A. Yes, sir.
Q. That is a matter of frequent occurrence, more or less, is it not?
A. Oh, yes.
Q. And you would consider that a part of the duties of the barn foreman or lineman?
A. Yes, sir.
Q. Now I want to know whether it is necessary, when a span wire has become disconnected from the trolley wire and you wanted to connect the two again, whether it is a necessary and usual thing, in using a block and tackle for that purpose, to pull on the block and tackle from the top of a car, or whether it can be done from the street?

A. Is it necessary to pull it from the top of a car?
Q. Yes, sir.
A. No, sir.
Q. It can be done from the street below, can it not?
A. The pulling can be done from the street below; yes, sir.
Q. Does not a person who pulls on it from the top of a car expose himself to danger which he would not expose himself to if he pulled from below?
A. Yes, sir.
Q. And for that person to stand on top of a loose box on top of the car, would he not expose himself to still greater risks?
A. Yes, he would.
Q. You have had experience in this line of business for some years?
A. Yes, sir.

149 Cross-examination.

(By Mr. HUMPHRIES:)

Q. How long have you been foreman out there?
A. Pretty close to four years.
Q. And so you are hired to look after the line, track, and the cars?
A. That constitutes part of my duties.
Q. That was part of your duties in your employment?
A. Yes, sir.
Q. Has been your duty all the time?
A. Yes, sir.
Q. You are employed for that purpose?
A. Not at all times during my foremanship.
Q. It was not all the time? Why not?
A. Because part of the time we had a lineman that looked after that part of the business.
Q. They sometimes do have linemen?
A. Sometimes; yes, sir.
Q. But after they let him go they made that part of your duty?
A. Yes, sir.
Q. How long, now, since you have been foreman out there was it they kept a separate lineman for that purpose?
A. Not for the last two and a half or three years.
Q. Not for the last two and a half or three years? What was the need of keeping a man before that time?
A. Because we had more work to do.
Q. And then they had a man especially for the line work?
A. At the time we had the lineman we had also charge of the Third St. & Suburban railroad in connection with our own work.

150 Q. And there was one man whose duty it was specially to look after the line?
A. Yes, sir.
Q. What was he called; superintendent of lines?

A. No, sir; just an ordinary lineman. He is in charge of the barn foreman.

Q. Now, when times got dull and you didn't have much work to do, they had you do that yourself?

A. Yes, sir.

Q. And when you pull up a trolley wire you always get down on the ground?

A. Not necessarily.

Q. How?

A. Not necessarily.

Q. Don't you know that it is extremely dangerous to get up there?

A. Don't I know that it is?

Q. Yes, sir.

A. Yes, sir.

Q. You always stand on the ground?

A. Not always.

Q. You don't always?

A. Not always.

Q. Do you ever do it?

A. Stand on the ground?

Q. Yes.

A. Oh, I might; yes.

Q. How did it come you got on the ground to do that work?

A. Well, at times it is unsafe to stand on the car.

Q. When did you ever stand on a car to pull the trolley
151 up that way?

A. In several instances; I don't know that I can recollect exactly the time.

Q. Now often, though?

A. Not often; no.

Q. Not often. How often did you stand on the ground?

A. Sometimes.

Q. You do not intend to give the jury the impression—did not in your original testimony—that you always stand upon the ground, did you?

A. Not necessarily, no.

Q. Did you tell Mr. Bausman before you took the witness stand that sometimes you did stand upon the car to do it?

A. Sometimes we do; yes, sir.

Q. When workmen are sent out they send out one of these construction cars, and they stand up there and fasten their pulleys and draw them together, and then they draw up the wire that has slipped?

A. Yes, sir.

Q. That is the way they do it?

A. Yes, sir.

Q. If you were to stand on the ground and pull it up, then you would have to climb up there and take hold and solder it on, would you not?

A. Yes, sir.

Q. That would be about as dangerous as to stand up there and pull it up, would it not?

A. No, sir.

Q. It would be pulled a little more, would it not, if it was not in the right place?

152 A. No, sir; if it wasn't in the right place it would; yes.

Q. Yes, sir; the real fact about it is the way they do that, they pull the wire back there in place, then they hold it while they solder it, and put the ear on. Is that it?

A. Yes, sir; exactly.

Q. That is the way they do the business?

A. Yes, sir.

Q. So that a man gets in danger when he gets up there; it might break while it was coming to the right place to put the ear on?

A. It is not so liable to.

Q. Well, it might.

A. There is a possibility.

Q. Then where would the man be when it did?

A. He must be on the other side of the wire when it breaks.

Q. Suppose he don't know which side to be on?

A. He has got to be on the inside of the curve.

Q. What?

A. He has got to be where it goes to when it breaks; he is supposed to know which way it goes; it can't go but one way when it breaks.

Q. He must be on the opposite side to the side it goes?

A. You bet.

Mr. HUMPHRIES: That is all.

Q. Do you know a man by the name of —— —— that worked out there?

A. Yes, sir.

Q. What was his business?

A. It was to take care of the line.

153 Q. Lineman?

A. No; he wasn't a lineman; he was just simply a laborer, that was all.

Q. A laborer?

A. Took care of the line, that was all—a laborer.

Q. What did he do?

A. Went out to help me on that line.

Q. Wasn't it the other way; you went out and helped him on the line?

A. No, sir.

Q. You kept, then, a special man, who worked on the line, but he went to help you?

A. He was my helper.

Q. He helped? He was a special lineman, wasn't he?

A. No, sir.

Q. An experienced man for that purpose?

A. No, sir.

Q. How long did you keep him at it?
A. About six or seven months.
Q. When did you let him go?
A. About the first of November.
Q. Who have you got now?
A. Nobody but myself and a boy to help me.
Q. Who did they have before Crawford?
A. They had a man by the name of Higgins.
Q. How long did Higgins work there?
A. Probably six or seven months.
Q. Who was the special lineman they had there before Higgins?
A. He was a man by the name of Blanton.
Q. What did he do?
A. He had charge of the line.
154 Q. He had charge of the line?

(Objected to as irrelevant. Question withdrawn.)

Redirect examination.

(By Mr. BAUSMAN:)

Q. At the time when the break is likely to happen—at the time when the trolley wire is liable to break, is when you are drawing it back, is it not?
A. Yes, sir.
Q. That is when the strain gets on it?
A. Yes, sir.
Q. Then, if this should be the line of the railroad (indicating) and this was your repair car, it would come up on the wire, would it not?
A. Yes, sir.
Q. The wire would be sagging down?

Mr. HUMPHRIES: I object to going into that again. You have been through that once.

Mr. BAUSMAN: If you do not want him to explain it to the jury——

Mr. HUMPHRIES: Withdraw the objection.

Q. Suppose this were the trolley wire and this were the line of the railroad (indicating), over here would be the trolley wire?
A. Yes, sir.
Q. And the trolley wire would be hanging down a little because one of the span wires had dropped off, which would be connected?
A. Yes, sir.
Q. And he brings his repair car in here (indicating) and fastens on the ground or any place one part of the tackle and the
155 block, one to the sagging trolley wire and one to the span wire?
A. Yes, sir.
Q. The span wire running from the other post this way (indc.)?
A. Yes, sir.
Q. Now, then, on the ground he can pull in on that?

A. Yes, sir.
Q. But if he wants to he can get up on the car and pull in?
A. Yes, sir.
Q. And then he takes his chances, isn't that it?
A. Yes, sir.

The COURT: That was stated before.
Mr. BAUSMAN: That is all.

(Testimony of witness closed.)

156 M. J. O'DONNELL, a witness called on behalf of defendant, being first duly sworn, testified as follows:

(By Mr. BAUSMAN:)

Q. Mr. O'Donnell, how long have you lived in Seattle?
A. About two years.
Q. What is your business?
A. At the present time, superintendent of the Third St. & Suburban railway.
Q. Are you acquainted with the duties of a barn foreman in Seattle? What would those duties include?
A. Well, he has the repair work.
Q. What repair work?
A. Barn and line.
Q. You are acquainted with the street-railroad business generally, as it is conducted in this city, are you not?
A. Yes, sir.
Q. Is it not part of the duties of a barn foreman——

(Objected to as leading.)

Q. Tell us what the duties of a barn foreman are.
A. He is supposed to have charge of all the repair work done; line and barn both.
Q. And if a conductor would come in and say that the line was down anywhere, would it or would it not be the duty of the barn foreman to go out there and see to it?
A. It would be the duty of the conductor to report it to the barn foreman.
Q. Then it would be the duty of the barn foreman to go out and repair it?
A. Yes, sir.

157 Q. Now, I will ask you whether you have had any experience in the connecting of wires by block and tackle.
A. Yes, sir.
Q. Have you ever seen or known of the connecting of a wire; picking up, you might call it, of a broken span wire so as to connect it with the trolley wire?
A. I have.
Q. That is usually done by means of a block and tackle, is it not?
A. Yes, sir.

Q. Now, can that be done; can a trolley wire be pulled over to the span wire from the street?
A. Yes, sir.
Q. Is it necessary to go on the car?
A. No, sir.
Q. Is it necessary to go on top of a box?
A. No, sir.

Mr. HUMPHRIES: I object to his leading the witness. Ask him how it is done; then leave that to the jury.

Q. Answer the question.
A. Yes, sir.
Q. Is it necessary to get on top of a box?
A. To pull that span wire?
Q. Yes, sir.
A. Not necessary; no, sir.
Q. Is it not more dangerous to stand on top of a car and put that strain on the trolley than it is to put that strain on it from below?
A. It certainly is more dangerous to the man that is pulling it up.
Q. It is still more dangerous if he stood on top of a box,
158 is it not?
A. Yes, sir.
Q. Are you acquainted with a man by the name of Burroughs?
A. What is his first name?
Q. John.
A. Yes, sir.
Q. Have you ever had any business experience with him?
A. I have had him work for me for a while, I think.
Q. What did you have to do with him?
A. I had him work on the track.
Q. What did he do on the track?
A. Put in ties, etc.
Q. Did you ever have any line work with Mr. Burroughs at all?
A. Yes. I believe he did help me for a few days when I was working for the Rainier Power & Railway Co.
Q. Did it involve any of this kind of work?
A. No, sir.

Mr. BAUSMAN: That is all.

Cross-examination.

(By Mr. HUMPHRIES:)

Q. What is your name?
A. M. J. O'Donnell.
Q. Do you know D. Thomas Denny?
A. Yes, sir.
Q. How long have you known D. Thomas Denny?
A. I got acquainted with him first when I came on the Third St. & Suburban, two years ago, I think.
Q. How long have you known Dixon?
A. I don't know the gentleman at all.

Q. Did you ever fasten the feed-wires onto the guy wire with D. Thomas Denny?

159 A. No, sir. I never worked under him—for Thomas Denny.

Q. You have a brother here that is working in that business too, have you not?

A. Not street railway—not at street railway.

Q. What does he do?

A. He works for the light department.

Q. He is a light man? How long has he been in the city?

A. Four or five years.

Q. You have only been here two years?

A. That is all.

Q. You know nothing about the arrangements that were had with Mr. Dixon, or contract?

A. No, sir.

Q. In 1892?

A. No, sir. I wasn't here at the time.

Q. You know nothing about that at all—don't know what his contract was?

A. No, sir.

Q. Nor what he was employed to do?

A. No, sir.

Mr. HUMPHRIES: That is all.

(Testimony of witness closed.)

160 D. C. EPP, a witness called on behalf of defendant, being first duly sworn, testified as follows:

(By Mr. BAUSMAN:)

Q. State what your business is.

A. Superintendent of the Grant Street electric railway.

Q. You are familiar with the use of electricity?

A. Yes, sir.

Q. You are familiar with the operation of street railways, are you?

A. Yes, sir.

Q. Are you acquainted with how they are operated in the city of Seattle?

A. Yes, sir.

Q. Are you acquainted with what the duties are of a barn foreman?

A. Yes, sir.

Q. Tell what they include.

A. That includes all general repairs.

Q. All general repairs? Would they include repairs on the line?

A. Yes, sir.

Q. If a conductor or gripman should report to the barn foreman that the line was down or out of order somewhere along the line of

road, would or would it not be the duty of the barn foreman to go and make repairs?

A. Yes, sir.

Q. Would it require any special order?

A. No, sir.

Q. As a matter of fact, there is plenty of time in which to do that as well as look after the duties of the barn, is there not?

(Objected to as leading.)

161 A. Yes, sir.

The COURT: The question is leading.

Q. Now, I want you to state whether you have ever had any experience or any acquaintance with the business of repairing wires at all, or have seen it done.

A. Yes; I have.

Q. Have you ever known an instance in which span wires that had got disconnected from the trolley wire had to be connected with the trolley wire again?

A. Yes, sir.

Q. Now, that is usually done by means of block and tackle, is it not?

A. Yes, sir.

Q. The tackle is thrown over the trolley which has partly fallen, and the block connected from that post to one of the span wires?

A. Yes, sir.

Q. After that, it is necessary to pull in on that, is it not?

A. Yes, sir.

(Objected to as leading.)

The COURT: Let the witness tell how the thing is done.

Q. That is right. Now, just state what you do when you put on the block and tackle there.

A. Why, under some circumstances, you fasten it to the span wire, and then haul over the trolley wire, and under other circumstances you fasten it to the pole, whichever the case may be.

Q. Then what do you do after you get the tackle block fast?

A. Pull the line in place.

162 Q. Now, can that be done from the car or can it be done from the street?

A. It can be done from both places.

Q. Tell this jury, in your experience, which is the safer way to do it.

A. The safest way is from the ground.

Q. Is there or is there not greater danger when you do that from the car than from the street?

A. Yes; always.

Q. There is greater danger on the car?

A. Yes, sir.

Q. Now, suppose that a box is on top of a car—you have stated

that it is more dangerous to pull from the top of a car than from the ground.

A. Yes; I have.

Q. Is it more dangerous to pull from the box than from the car?

A. I should think it would be.

Q. Is that especially true if the box is unfastened?

A. Yes, sir.

Mr. BAUSMAN: That is all.

Cross-examination.

(By Mr. HUMPHRIES:)

Q. Where do you work?

A. On the Grant Street.

Q. How long have you worked there?

A. About a year.

Q. What is your business?

A. I am superintendent there.

Q. You are superintendent of the Grant Street line. You
163 are working under Mr. Grambs?

A. Yes, sir.

Q. Mr. Grambs is superintendent of this Third Street line in the city, is he not?

A. I think so.

Q. Now, the fact is, Mr. Grambs is connected with all these electric lines except the West Street and James Street lines?

A. I could not say that.

Q. He is connected with the Consolidated, is he not?

A. I don't know that he is.

Q. You don't know that it is a fact that Mr. Grambs represents the General Electric Company, and that is part of the Consolidated? He represents three companies now?

A. I don't pay any attention to his business further than it applies to the road I am superintendent in.

Q. That is all you know? When did you first talk to him about this case?

A. I don't know as I ever said anything to him about it.

Q. When were you called in as a witness here?

A. I was called in last night.

Q. You consulted with Mr. Bausman last night?

A. No, sir; I never saw Mr. Bausman, to my knowledge, until he got up here and questioned me.

Q. You saw Mr. Grambs, did you, last night?

A. Yes, sir.

Q. You told him what your testimony would be?

A. No, sir.

Q. Did you tell him at all?

A. Didn't tell him a thing.

Q. You had a consultation and never told him a thing?

164 A. We had no consultation; he simply notified me that he wanted me in court this morning.

Mr. HUMPHRIES: That is all.

(Testimony of witness closed.)

Mr. BAUSMAN: There was something stated about our taking down the wire to let a house pass under. I don't know whether that testimony is in or out of the case. If it is in I wish to introduce the city charter to show that we had to do that.

(It is understood by counsel for both parties hereto that there is no testimony in *in* regard to that.)

(Defendant at this time offers in evidence the chart referred to in the examination of witnesses, and the same is admitted without objection and marked Defendant's Exhibit No. 1.)

(Here follows diagram marked page 164*a*.)

Defendant rests.

165 *Plaintiff's Rebuttal.*

166 HENRY HONNEN, a witness called on behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

(By Mr. HUMPHRIES:)

Q. What is your name?
A. Henry Honnen.
Q. What is your occupation?
A. At present I am not doing much of anything.
Q. What was your occupation in 1892 and 1893?
A. Conductor on the Third Street line.
Q. Did you know Mr. Wolf?
A. Yes, sir.
Q. Do you know Mr. O'Donnell?
A. Which O'Donnell?
Q. The electric light O'Donnell; brother to this one that was on the witness stand?
A. Yes, sir.
Q. What do you know, if anything, about Mr. O'Donnell putting in the feeders along your line of road—the Third Street line?
A. I remember him putting in some feeders from the feeder to the trolley wire.
Q. Where was that?
A. It was on the Third Street line.
Q. Do you know who helped him do it?
A. I never saw no one help him.
Q. Do you know about Wolf working for the Third Street line at the same time that he was working for the Baker Company?
A. I know that he did some work on the Third Street line.
Q. What was he doing?

A. Working on the trolley wire.

167 Q. Now, is it not a fact that he, while working for Baker on part of it, was working for the company on the other part of it?

A. Well, I don't know as to that; but he was working—I know he did some work there.

Q. That is, he did work in both places?

A. Well, he did work on the trolley wire; that is where I saw him work.

Q. What was he doing?

A. He had some men there soldering hangers on the trolley wire.

Q. That was J. M. Wolf?

A. Yes, sir.

Q. The same man that constructed this line?

A. Yes, sir.

Q. Did you continue working when Backus was appointed receiver?

A. Yes, sir.

Q. On the day that Dixon was hurt where were you?

A. I was working that day.

Q. What part of the work were you doing?

A. As conductor.

Q. Which end of the line were you on?

A. I was out in Brooklyn at the time Mr. Dixon was hurt.

Mr. HUMPHRIES: That is all.

(No cross-examination. Testimony of witness closed.)

168 JOHN BURROUGHS, recalled on behalf of plaintiff in rebuttal, testified as follows:

(By Mr. HUMPHRIES:)

Q. What size wire was this at the corner of Depot and Stewart streets?

A. No. 4.

Q. No. 4 wire?

A. Yes, sir.

Q. This piece of wire marked as an exhibit here—that is, No. 4 wire—where did you get that?

A. It is a piece that was picked up along the line out in Latona.

Q. A piece of wire you got along the *wire* in Latona?

A. Yes; picked up on the line—picked up in the street.

Q. Was the wire the same size as that at Depot and Stewart St.?

A. As far as I know, the wire was the same size from one end of the line to the other. The same sleeves fit the wires at every place.

Q. You may state whether or not at the same time Mr. Wolf was working, constructing part of this line for Mr. Baker, whether or not he was working for the company at the same time.

A. He was.

Q. Do you know whether or not he was the inspector employed by the Dennys to see that Baker put up his wire right?

A. As far as I know, Mr. Wolf had been their lineman for some years—their constructor.

Mr. HUMPHRIES: That is all.

(Testimony of witness closed.)

169 SAMUEL DIXON, recalled in rebuttal, testified in his own behalf as follows:

(By Mr. HUMPHRIES:)

Q. Mr. Dixon, you know of a man by the name of O'Donnell?

A. Yes, sir.

Q. What work, if any, did he do there upon that line while you were there?

A. Mr. O'Donnell was lineman for the light department for the same company, and Wolf superintendent upon the line, constructing for the line department during the fall of 1892 and winter and spring of 1892. I think they got the city lighting some time that season.

Q. What do you know about his putting these feeders in along there? Did he help you or you help him?

A. I helped him put in some feeders from the feed-wire that ran to Ravenna park into the trolley wire. I suppose we put in twelve or fifteen feeders from the end away out next to the park, back into Brooklyn and Latona. Mr. Denny came out there one forenoon, and he says, "Mr. O'Donnell will be out right away after dinner to put in these feeders; you go and help him." I went and helped him all the afternoon putting in those feeders, and some time during that winter—I wouldn't be sure; towards spring—they changed the power, and Mr. Denny came out and helped me put in a cut-out on the main street, and the- ran the outer end of the line from the power at the barn. The power here at the town end of the line was running the Consolidated, and he sent me to help O'Donnell to change these wires one night after the power was shut off; then we put the switch, side track, and spurr to the wood yard on 8th and Pike. I think Mr. Winchell, the superintendent, went with

170 me and helped me put in the iron-work. The span wire was in such poor shape it wouldn't work. The same week, or about—a short time after, Mr. Smith, the superintendent of the light department, and O'Donnell came out there and had me go down with them, and that became wore out, that soft wire—that copper wire to that spurr.

Q. So that at the time you were working for them, after Wolf quit—after Stocks quit—they had another set of men?

A. They had a regular lineman in the light department.

Q. They had a lineman in the light department, and whenever anything was wanted to be done they would switch him over in this other department?

A. They done that work in putting in these feeders.

Q. Now, I will ask you the question whether or not you were employed at all—at any time—as a lineman.

A. No, sir; I never was.

Q. I will ask you the question whether or not at any time you were put in general charge of the line.

A. I never had any authority from the superintendent nor the manager to hire or discharge any man while I was in their employ; never had any authority to hire. They put in just such man as they wanted to, and fired them when they wanted to.

Q. You hadn't anything to do with that?

A. Nothing to do with it whatever.

Q. What superintendence of the line or management did they ever put in your charge?

A. They never put any in my charge.

Mr. HUMPHRIES: That is all.

Testimony closed.

171 The COURT: I want to say to counsel before I begin reading these instructions to the jury that I have prepared written instructions upon the main features of the case. There is some instruction as to the burden of proof that I ask permission of counsel to give them without writing.

(Counsel for both parties agree that the court may do this.)

The COURT: Gentlemen of the jury, this is an action brought to recover damages for an injury suffered by the plaintiff from the alleged negligence of the defendant. The plaintiff alleges in his complaint that at the time of the injury complained of he was in the employ of the defendant; that he was employed as an electrician to repair cars and electrical machinery and to do such other work as he should be requested by the defendant to do. He alleges that he was in the employ of the defendant as above prior to the 13th day of June, 1893, and he continued, he alleges, in said employment up to the time of the injury that he complains of. The road and property and management of the company, it is alleged, passed into the hands of a receiver on the 13th day of June, 1893. It is alleged that this accident or injury was received by the plaintiff while adjusting or repairing the trolley wire and span wire, at the request of defendant, on the 15th day of June, 1893. It becomes an important question, then, as to whether the plaintiff was in the employ of the company at the time of the injury.

I instruct you that if you find from the evidence that plaintiff had been employed by the company, as he alleges, prior to and up to the 13th of June, 1893, and had received no notice to quit, and the road was being operated as usual, that he was in the

172 employ of the company at the time of the injury. In considering this point you will take into consideration what the evidence shows was done with reference to other employees of the company.

II.

It is the duty of persons or corporations operating street-car lines to use ordinary care and prudence to see that the places where the employees are working, the machinery, appliances, and appurtenances, are in good order and condition and not defective; and for the purpose of keeping the road, appliances, wires, and tracks in safe condition, it is the duty of the person or company operating the road to inspect the road, appliances, wires, and tracks where the employees are expected to work, and repair any defects in the same.

III.

If you find from the testimony that when the line of defendant's road was constructed around and near the corner of Depot and Stewart streets, in the city of Seattle, Washington, that small ears were put upon the wires, and that by reason of such small ears being put upon the wire, kinks were made at the end of the ears in the wire, and afterwards the same ears were removed and curved ears placed upon the trolley wire, instead of the small ears; that the kinks in the wire were negligently pounded out, and the wire was negligently left in an unsafe and weak condition and subject to break, and that the company, with full knowledge of such weak and unsafe condition, negligently continued to use the same; that when the receiver, M. F. Backus, was appointed, he kept in his employ, until the happening of the injury to plaintiff, the same manager and superintendent that was employed by the company, and the manager and superintendent and company knew of the wire being
173 unsafe and in a weak and dangerous condition, and you find that plaintiff was employed as a workman and car-repairer for the company, and continued in such employment after the receiver was appointed, and while employed by the company did special work upon the line when directed by the manager and superintendent, and that he was not a superintendent and had no power or authority to inspect the line and was not employed for that purpose, and that by the order and direction of the officers and manager in charge he was sent to the corner of Stewart and Depot streets to fasten the span wire to the trolley wire, and that he had no knowledge of any defect in the trolley wire; that while drawing the span wire and trolley wire together the trolley wire broke where the same had been negligently left in a weak and unsafe condition and where the kink had been negligently pounded out, and plaintiff was thrown to the ground and injured, and you find that this injury was caused by the fault and negligence of the receiver and without any fault or negligence on his part, then he will be entitled to recover the actual damages sustained.

IV.

I instruct you, gentlemen, as a matter of law, that when Samuel Dixon entered the employment of the receiver, if you shall find that he did enter the receiver's employment, he assumed all the risks which are ordinarily connected with the kind of occupation for which he was employed.

V.

I instruct you, gentlemen, as a matter of law, that if it was a part of the ordinary duties of Samuel Dixon in the employ of the
174 receiver, if you shall find that he was in the receiver's employment, to do work in repairing the railroad's trolley wires and span wires, then plaintiff Dixon assumed all the risks which are ordinarily connected with the work of repairing trolley wires or span wires, and for any injury resulting from such risks he cannot recover.

VI.

I instruct you, gentlemen, as a matter of law, that it makes no difference by what name plaintiff Dixon's employment may have been called, provided it was one of his duties to do repair work upon the railroad's trolley wire and span wire, and in repairing such trolley wire or span wire he assumed all the risks which are ordinarily connected with such repair work, if it was a part of his ordinary duties, no matter by what name his employment may have been called.

But I also instruct you, in addition to the instruction just given, that if you should find from a fair preponderance of the testimony that it was not one of the ordinary duties of plaintiff's employment to put into position a trolley wire or to make repairs thereon, and to properly connect therewith the span wires, and that he did such last-mentioned work or repairing at the request of the company, in that case he was required only to exercise ordinary skill and care, and that the company owed to him the duty of having its appliances, including its trolley wire, in a reasonably safe condition, and that the company would be liable to plaintiff if its appliances, including the trolley wire, were not in such reasonably safe condition and plaintiff had no knowledge of its defects, provided such defects were the proximate cause of the injury complained of.

175 VII.

I instruct you, gentlemen, as a matter of law, that if you should find that plaintiff Dixon, as one of his ordinary duties in the employment of the receiver, had to do repair work on the railroad's trolley wires and span wires, then he assumed all the risks arising from any accidents that might befall him in the performance of such duties arising from causes which the receiver could not reasonably foresee and against which no reasonable industry on the receiver's part could protect him.

In connection with that, I give you this instruction (this instruction is given because there may be conflict in the testimony as to what were the ordinary duties of plaintiff's employment):

I also instruct you, as a matter of law, that it was the duty of the company to use care and diligence in ascertaining whether the appliances were reasonably safe for the purposes of their use.

VIII.

I instruct you, gentlemen, as a matter of law, that if plaintiff Dixon was at any time in the employ of the receiver, the receiver was not an insurer of his safety, and that the receiver discharged his duty toward plaintiff Dixon's safety in this particular matter if the trolley wires and span wires which plaintiff was to repair at this particular place were reasonably adapted to the work which plaintiff Dixon should have to use them for.

IX.

I instruct you, gentlemen, as a matter of law, that if you
176 shall find that plaintiff Dixon was at the time he received his injuries in the employment of the receiver and knew or could have known by ordinary vigilance of any defects in the trolley wire exposing him to risk in placing a strain upon it, then plaintiff Dixon, in placing a strain upon it under such circumstances, assumed all the risks of such strain, and cannot recover.

X.

I instruct you, gentlemen, as a matter of law, that it is the duty of an employee to use all reasonable means of avoiding harm to himself in his employment, and if he fails to see a defect which, with reasonable vigilance, he ought to see and is injured on account of it, he cannot recover.

XI.

I instruct you, gentlemen, as a matter of law, that in determining whether plaintiff Dixon was aware of any defects, if there were defects, in the trolley wire at the place at which he was injured, it is not necessary that you have before you testimony that he actually did see such defects, if you shall also find that plaintiff Dixon had had reasonable opportunities, either before or at the time of the accident, to perceive such defects.

XII.

In the performance of any or all of his duties as employee, plaintiff is required to exercise ordinary care and skill in such discharge of his duties, and if he received his injuries, if any, from the want of such care or skill, he cannot recover, and this care and skill increases as the danger increases. This principle applies as
177 well to the position occupied by the plaintiff at the time he performed the work *and* to the doing of the work itself.

(The following were given orally :)

XIII.

The burden of proof, gentlemen, upon the main propositions in this case, upon the allegations in the complaint, is upon the plaintiff, and he must sustain the allegations of his complaint by a fair preponderance of the testimony.

As to the new matter set up in the answer by way of defense, the burden of proof is upon the defendant, and he must make out this new matter which is set up as a defense, such as contributory negligence, by a fair preponderance of the testimony, in order to sustain his defense.

XIV.

You have all been upon juries before, I presume, but it may not be out of place to say that you are to give to the testimony of the various witnesses who have appeared before you such credit, not only for veracity, but such weight to their statements as you as men of experience deem them entitled to. If there is a conflict in the testimony, you are to reconcile the testimony, if possible; if not, you are to give credit to, and base your finding upon, that which you deem to be the more credible.

XV.

Should you find for the plaintiff, then, in measuring the damages, if any he has sustained, you may take into consideration the reasonable value of his time lost, if any, consequent upon
178 his injury; the necessary sums of money, if any, expended for medical attendance, nursing, and medicine rendered necessary by his injuries; the physical pain and suffering; mental agony and distress of mind, if any, consequent upon his injuries received; and if you believe from the evidence that plaintiff's injuries, if any, are permanent and will disable him to labor and earn money in the future, then you may, in addition to the above, find such other sum as will be a fair compensation for his future diminished capacity to earn money, but in no case can you go beyond the amount mentioned in the complaint. Find any sum which in your judgment is a proper sum inside of the amount mentioned in the complaint.

XVI.

The attorneys on each side have furnished the court a large number of questions, which they ask me to submit to you to be answered. Some of these questions have been read to you, and comments have been made upon them. I am going to allow these questions to go to the jury, and to ask the foreman to write out answers to them, after they have been found. First, you are to consider whom you should find for, plaintiff or defendant. Then, after you have determined that, you are to take up these questions and answer them. Your foreman just answers the questions—the name of your foreman just goes onto these, at the bottom of these questions. Your foreman had better sign the answer to each of these questions separately.

Here are the pleadings, gentlemen, the form of the verdict, and these special findings.

XVII.

Under the law, gentlemen, if ten of you agree upon a verdict that is a good verdict, and you are ready to report, if ten of
179 you agree upon a verdict, whatever verdict you may find, it makes that a good verdict in a civil case.

180 *Defendant's Exceptions to Instructions.*

Defendant excepts to the refusal of the court to give instruction No. 1, as requested by the instructions proposed and submitted by the defendant, which is as follows:

"I instruct you, gentlemen, as a matter of law, that even if you shall find that Samuel Dixon was, up to the time of the appointment of the receiver, in the employ of the Rainier Power & Railway Company that such circumstance alone would not make plaintiff Dixon the employee of the receiver when the latter took charge of the road, unless you shall also find that the receiver, upon taking charge or afterwards, before plaintiff Dixon's injuries, employed or caused him to be employed for the receiver or unless the receiver, having had a reasonable time in which to remove or change the old employees, had made no changes in the former employees after such reasonable opportunity. If you shall find, therefore, that the receiver did not employ Dixon or cause him to be employed before his injuries, and did not have a reasonable opportunity in which to make changes in the employees of the company, then plaintiff Dixon cannot recover."

Exception allowed.

Defendant excepts to the addition to defendant's proposed instruction No. 4 as given by the court, which is as follows:

"I instruct you, gentlemen, as a matter of law, that it makes no difference by what name plaintiff Dixon's employment may have been called, provided it was one of his duties to do repair work upon the railroad's trolley wire and span wire, and in repairing such trolley wire or span wire he assumed all the risks which
181 are ordinarily connected with such repair work, if it was a part of his ordinary duties, no matter by what name his employment may have been called," the court adding:

["But I also instruct you, in addition to the instruction just given, that if you should find from a fair preponderance of the testimony that it was not one of the ordinary duties of plaintiff's employment to put into position the trolley wire or to make repairs thereon, and to properly connect therewith span wires, and that he did such last-mentioned work or repairing at the request of the company, in that case he was required only to exercise ordinary skill and care, and that the company owed to him the duty of having its appliances, including its trolley wire, in a reasonably safe condition, and that the company would be liable to plaintiff if its appliances, including the trolley wire, was not in such reasonably safe

condition, and plaintiff had no knowledge of its defects, provided such defects were the proximate cause of the injury complained of."]*

Exception allowed.

The defendant excepts to the addition to instruction No. 5 as proposed by defendant, as given by the court, which is as follows:

"I instruct you, gentlemen, as a matter of law, that if you shall find that plaintiff Dixon, as one of his ordinary duties in the employment of the receiver, had to do repair work on the railroad's trolley wires and span wires, then he assumed all the risks arising from any accidents that might befall him in the performance of such duties arising from causes which the receiver could not
182 reasonably foresee and against which no reasonable industry on the receiver's part could protect him," the court adding:

"In connection with that, I give you this instruction: This instruction is given because there may be a conflict in the testimony as to what were the ordinary duties of plaintiff's employment.

"I also instruct you, as a matter of law, that it was the duty of the company to use care and diligence in ascertaining whether the appliances were reasonably safe for the purposes of their use."

Exception allowed.

Defendant excepts to the refusal of the court to give defendant's proposed instruction No. 7, which is as follows:

"I instruct you, gentlemen, as a matter of law, that it was the duty of plaintiff Dixon, if he were in the employment of the receiver, to advise the receiver or plaintiff Dixon's own superior officers of any defects in the trolley wire, and if you shall find that plaintiff Dixon knew of such defects, or by any reasonable industry could know of such defects, on the curve at Depot and Stewart streets, and if plaintiff Dixon then failed to make such defects known, as aforesaid, then plaintiff Dixon cannot recover in this case."

Exception allowed.

Defendant excepts to refusal of the court to give defendant's proposed instruction No. 11, which instruction is as follows:

"I instruct you, gentlemen, that the law will not permit an employee to expose himself unnecessarily to danger, and if you shall find that plaintiff Dixon could have stood in a safer position than that in which he was injured while doing his work, then plaintiff Dixon cannot recover."

Exception allowed.

183 Defendant excepts to the refusal of the court to give defendant's proposed instruction No. 12; which instruction is as follows:

"I instruct you, gentlemen, as a matter of law, that if you shall find that the business of repairing trolley or span wires is a dangerous occupation, then plaintiff Dixon assumed all the risks of a dangerous occupation."

Exception allowed.

[* Matter enclosed in brackets underscored in copy.]

Defendant excepts to the refusal of the court to give instruction No. 13 proposed by defendant; which instruction is as follows:

"I instruct you to return a verdict in favor of defendant."

Exception allowed.

Defendant excepts to the giving of instruction No. 1 of plaintiff as given by the court; which instruction is as follows:

"It is the duty of persons or corporations operating street-car lines to use ordinary care and prudence to see that the places where the employees are working, the machinery, appliances, and appurtenances, are in good order and condition and not defective, and for the purpose of keeping the road, appliances, wires, and tracks in a safe condition it is the duty of the person or company operating the road to inspect the road, appliances, wires, and tracks where the employees are expected to work and repair any defects in the same."

Exception allowed.

Defendant excepts to the giving of instruction No. 2 of plaintiff as given by the court; which instruction is as follows:

"If you find from the testimony that when the line of the
184 defendant's road was constructed around and near the corner of Depot and Stewart streets, in the city of Seattle, Washington, that small ears were put upon the wires, and that by reason of such small ears being put upon the wire kinks were made at the end of the ears, in the wire, and afterwards the same ears were removed and curved ears placed upon the trolley wire instead of the small ears; that the kinks in the wire were negligently pounded out, and the wire was negligently left in an unsafe and weak condition and subject to break, and that the company, with full knowledge of such weak and unsafe condition, negligently continued to use the same; that when the receiver, M. F. Backus, was appointed he kept in his employ, until the happening of the injury to —, that same manager and superintendent that was employed by the company, and the manager and superintendent and company knew of the wire being unsafe and in a weak and dangerous condition, and you find that plaintiff was employed as a workman and car-repairer for the company, and continued in such employment after the receiver was appointed, and while employed by the company did special work upon the line, when directed by the manager and superintendent, and that he was not a superintendent and had no power or authority to inspect the line, and was not employed for that purpose, and that by the order and direction of the officers and manager in charge he was sent to the corner of Depot and Stewart streets to fasten the span wire to the trolley wire, and that he had no knowledge of any defect in the trolley wire; that while drawing the span wire and the trolley wire together the trolley wire broke where the same had been negligently left in a weak and unsafe condition, and where the kink had been negligently pounded out, and
185 plaintiff was thrown to the ground and injured, and you find that this injury was caused by the fault and negligence of the receiver, and without any fault or negligence on his part, then he will be entitled to recover the actual damages sustained."

Exception allowed.

Defendant excepts to *to* giving by the court of instruction No. 3, as proposed by plaintiff; which instruction is as follows:

"Should you find for the plaintiff, then, in measuring the damages, if any, he has sustained, you may take into consideration the reasonable value of his time lost, if any, consequent upon his injuries; the necessary sums of money, if any, expended for medical attendance, nursing, and medicines rendered necessary by his injuries; the physical pain and suffering, mental agony, and distress of mind, if any, consequent upon his injuries received; and if you believe from the evidence that plaintiff's injuries, if any, are permanent and will disable him to earn money in the future, then you may, in addition to the above, find such other sum as will be a fair compensation for his future diminished capacity to earn money."

Exception allowed.

Defendant excepts to that portion of the instructions given by the court on its own motion which is as follows:

It becomes and important question, then, as to whether plaintiff was in the employ of the company at the time of the injury. I instruct you that if you find from the evidence that plaintiff had been employed by the company, as he alleges, prior and up to the 13th of June, 1893, and had received no notice to quit, and the road was being operated as usual, that he was in the employ of the
186 company at the time of the injury. In considering this point you will take into consideration what the evidence shows was done with reference to other employees of the company."

Exception allowed.

187 In the Superior Court of the State of Washington for King County.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver of the Rainier Power & Railway Company, Defendant. } No. —. Stipulation.

It is agreed by and between the parties hereto that the following is the evidence and testimony of George Newell and George B. Stocks, a witness for the plaintiff in the above-entitled cause, and that either party may use said testimony upon the trial of said cause as fully and to the same extent as if said testimony was detailed upon the witness stand. All formal objections to the manner of taking the testimony *is* hereby waived, but the defendant expressly reserves the right to object on trial to the competency, materiality, or relevancy of said testimony as fully and to the same extent as if the said witness — stand, and all questions and answers shall be subject to the same objection as if the same were asked the witness upon the witness stand and answered by him upon the wit-

ness stand; all further matters as to the form of taking said testimony and the introduction of the same *is* hereby waived.

Dated March 28, 1896.

JOHN E. HUMPHRIES,
E. P. EDSEN, AND
REMSBERG & ATKINSON,
Attorneys for Plaintiff.
DANIEL KELLEHER,
Attorneys for Defendant.

188 In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver, Defendant.
} No. —. Deposition.

GEORGE NEWELL, being first duly sworn, on oath gave the following, his testimony in the above-entitled action:

Direct examination by Mr. HUMPHRIES:

Q. What is your name?
A. George Newell.
Q. Where do you reside?
A. In Seattle.
Q. How long have you resided in Seattle?
A. Six years and three months.
Q. Are you going to leave Seattle?
A. Yes, sir.
Q. When do you leave?
A. Monday next.
Q. Where are you going to?
A. Alaska.
Q. How long do you expect to be gone?
A. I do not know definitely; from six months to three years.
Q. Do you know Samuel Dixon?
A. Yes, sir.
Q. How long have you known him?
A. Six years or over.
Q. Were you present at the time or shortly after the time he received his injury?
A. About ten minutes after he received the injury.
189 Q. Where did you see him first?
A. Lying on the ground.
Q. Where at?
A. At Depot and Stewart streets.
Q. Do you remember the time that you saw him there?
A. I think it was on the 15th day of June, 1893.
Q. What was his condition when you saw him?
A. He had received an injury, and was almost unconscious and was groaning.
Q. What was your occupation?

A. I was motorman for the Rainier Power and Electric Co.

Q. How long had you been motorman?

A. I had been in their employ since August, 1892.

Q. What called your attention to the plaintiff at the time?

A. Well, when I reached there, where the line was broken, we had to stop, and saw a car there and saw him lying on the ground.

Q. What experience have you had with electric wires?

A. I was two years and three months in the electric light business, and have been six years on the cars.

Q. Are you acquainted with the different kinds of electric wires, trolley wires, and span wires?

A. I am somewhat acquainted with them; am not an expert at such business.

Q. What was the condition of the plaintiff when you saw him?

A. After we worked with him a while he was taken to his home in the patrol wagon.

Q. Did you see how he was injured?

A. Yes, sir.

Q. What examination did you make of the trolley wire at that time?

190 A. I coiled the wire up and helped put in a temporary piece of trolley wire.

Q. What was the condition of the trolley wire at that point at that time?

A. When I coiled it up, the trolley wire was apparently rotten.

Q. What evidence did you notice of its being rotten?

A. In coiling it up, a piece broke off while I was rolling it up, and I examined it and twisted it and broke another piece off.

Q. Do you know what became of that wire?

A. I cannot say. I think the lineman took it to the barn and put it in the junk pile.

Q. How long did the balance of the wire at that point remain?

A. The wire was taken down four or five months ago.

Q. What was peculiarly the matter with this trolley wire?

A. It is pretty hard to say. I do not think I could say what was the matter with the wire; there might have been several different things caused it to be rotten there.

Q. What do you mean by a wire being rotten?

A. I mean a wire you can break off with your hands; one cut or burned so you could twist it off.

Q. Do you know about how much of this wire was rotten?

A. The wire from the Lake Union to the car barn, clear down town, either was rotten or of bad construction, I cannot say which.

Q. How long had you known Mr. Dixon previously to his being hurt?

A. About three years.

Q. What was his occupation during that time—during the time you knew him?

A. He was car-repairer at the Consolidated street railway
191 barn for about one and one-half years, and then he had been working for the Rainier Power & Electric Co. for about a year.

Q. How near Depot street was it you found him?
A. It was right on Depot and Stewart streets, at the corner.
Q. Do you know what effect it has upon a line around a curve to be taken down and replaced?
A. I do not know as it would have any particular effect.

Cross-examination by Mr. KELLEHER:

Q. Previous to the time of this accident you had been a motorman on this railway for how long?
A. Since Aug. 23, 1892, if I remember right.
Q. As motorman you passed over this line every day on the car?
A. Yes, sir.
Q. Had any accident ever taken place at this curve before this, to your knowledge?
A. No, sir; not to my knowledge.
Q. The wire never had been broken before?
A. No, sir.
Q. You say when you piled up this wire after the accident it appeared to be rotten?
A. Yes, sir.
Q. That condition, you say, might have been caused by one of several causes?
A. Yes, sir.
Q. You cannot say from which cause this was in that condition?
A. No, sir.
Q. You say it is often caused by being burned by the current?
A. Yes, sir.
Q. Now, it might have been a burn that caused it?
192 A. It might have been.
Q. Now, it might have been burned at the time of the accident itself, when the wire fell on the ground, and it might have been burned by contact with the rail?
A. If it fell so as to connect the circuit which run through it.
Q. If it got a good contact with the rail, would not that kind of a contact with the ground have burned it?
A. If it fell in a way so as to connect the circuit, it would burn.
Q. If it fell on the wet ground or on the rail, would not that have been a good connection?
A. It would.
Q. That might have caused the condition of the trolley wire at the time?
A. It might have.
Q. You have been friendly with Mr. Dixon for several years?
A. Yes, sir.
Q. Seen him before and since the accident?
A. Yes, sir.
Q. Taking down the trolley wire and putting it back again would not injure the condition of the wire?
A. I do not think it would affect it if it was carefully handled. I think it can be taken down and put back again.

Q. You say you are not an expert in electricity?
A. No, sir.
Q. You have simply been a motorman and seen practical work as such. That is where you get your knowledge of electricity?
A. I have handled wires, more or less, but not a practical lineman.

Q. You say this wire, most of it, has been in use on the
193 road ever since until how long ago?
A. It was removed in the summer of fall of 1895.

Re-examination by Mr. HUMPHRIES:

Q. When you spoke of the wire being rotten, you meant the trolley wire?
A. I meant the trolley wire.

194 In the Superior Court of King County, State of Washington.

SAMUEL DIXON, Plaintiff,
vs.
FRED BAUSMAN, Receiver, Defendant. } No. —. Testimony.

GEORGE B. STOCKS, being first duly sworn, upon oath testified as follows:

Examination by Mr. HUMPHRIES:

Q. What is your name?
A. George B. Stocks.
Q. What is your age?
A. 39 years old.
Q. Where do you reside?
A. Latona.
Q. Are you going to leave the State?
A. Yes, sir; today at 12.20.
Q. When will you be back?
A. I don't know if I will ever be back.
Q. Do you know Samuel Dixon?
A. Yes, sir.
Q. How long have you known him?
A. 6 years.
Q. Do you know if he was ever injured?
A. Yes, sir.
Q. When was it he was injured?
A. The exact date I don't recollect.
Q. What were you doing at that time?
A. I believe I was working for Wolf.
Q. Did you ever work for the Rainier Power & Railway Co.?
195 A. Yes, sir.
Q. Did you ever work upon the line of the road at the point where this injury occurred to Dixon?

A. Yes; I worked from one end of the road to the other.

Q. Explain, if you can, the condition of the wire at the place where Dixon was injured, if you know.

A. When we put up that wire it was with ears made for No. 0 wire, but the wire we were putting up was No. 4 wire, and the ears being too large for No. 4 wire, the trolley knocked the ears around, and we had to take the ears off and put on regular curve ears. The small ears made a kink by the church on the corner. They made a kink at most every place, and one place it kinked very bad. We had to pound them all out straight and put on curve ears. This was the condition of the wire.

Q. Did you see the wire immediately after Mr. Dixon was injured?

A. Yes, sir.

Q. What condition was it in?

A. Broke.

Q. Where was it broke?

A. At the same place we pounded the kink straight.

Q. What effect does it have to pound a kink out?

A. A short kink leaves a crack in it. This was a short one.

Q. Did you observe whether this one had cracked it?

A. I did not observe; it might have.

Q. How long was this before Dixon was injured?

A. I suppose a month or owo; it might have been longer.

Q. Did that weaken the wire, by pounding out the kink?

A. O, certainly; I mean a short kink.

Q. What is the effect as to whether it makes it dangerous to use a wire after a short kink had been pounded out?

196 A. It does unless you put a sleeve on it.

Q. Was there any sleeve on this one?

A. No, sir.

Q. What experience have you had in examining and working with wires?

A. I have been working around wires and construction for the last six years, more or less.

Q. What was your occupation with regard to wires?

A. Putting up wires.

Q. Your occupation was putting up wires?

A. Yes, sir.

Q. Who was with you when this kink was pounded out?

A. Chas. Wooding, A. H. Alexander, and myself.

Q. Where is Chas. Wooding?

A. Dead.

Q. Where is A. H. Alexander?

A. Living in Latona.

Q. How long did you say this was before Mr. Dixon received his injury?

A. I couldn't say exactly. It was 2 or 3 months. I know it was before.

Q. Where should a lineman stand in repairing—when repairing—a wire, when fixing a wire?

A. He should stand in towards the span wire, on the outside of the curve.

Q. Why should he stand on the outside of the curve?

A. In pulling up the span wires there is what is called a "come-along" used in pulling up the wire. We put that on the span wire and attached the other end to the trolley wire and stand on
197 the outside of the curve, so that if the line slips you will not be caught, but will be on the safe side—that is, on the safer side.

Q. On the outside of the curve, do you mean?

A. On the outside of the curve.

That is all.

Cross-examination by Mr. BAUSMAN:

Q. Where are you going from Seattle?

A. Pittsburg.

Q. What are you going there for?

A. To work.

Q. What are you going to work at?

A. I hardly know what, whether in the car barn or shops of the Westinghouse Electric Co. or the Mansfield Co.

Q. Have you got a job yet?

A. I have one promised, but I don't know exactly what it is.

Q. You will be back here if you don't get it?

A. I expect to get one.

Q. Where is your family?

A. Here.

Q. If you don't get a job in Pittsburg you will have to come back?

A. I must have a job there; I can't get back.

Q. You are not certain of your job there, are you?

A. Yes, sir; there is no going back of that.

Q. It is promised, is it?

A. Yes, sir.

Q. What has been your business here?

A. I have been working on the construction of the street railroad.

Q. Are you an expert electrician?

A. No, sir; not exactly that.

Q. How long have you been in that work, all told?
198 A. A little over 6 years.

Q. What company were you working for last?

A. The Union Electric Company.

Q. How long did you work for the Rainier Power & Electric Co. at the time of this accident?

A. Ever since the railroad company started up.

Q. What was your business in your work?

A. Stringing wire ans setting poles.

A. What name did they give to your place?

A. I was called groundman.

Q. What were your duties?
A. To attend to anything that wanted doing; putting up wire; when there was climber's work, I did that.
Q. Who did the duty of inspecting the wire after it was put up?
A. I don't know.
Q. Did you have something to do with putting up this curve?
A. We put up the line from one end to the other.
Q. When did you put that up—1892, wasn't it—this curve was put up in 1892?
A. Yes, sir; it was in 1892.
Q. Did you ever know of an accident at that curve before?
A. No, sir.
Q. Have you been over the line frequently?
A. Many a time.
Q. Who was superintendent at that time?
A. Tom Denny.
Q. Do you remember Mr. Clark?
A. Mr. Clark of the Consolidated lines you mean? I know of him. He was not superintendent then.
199 Q. Were you there at the time of the accident?
A. No, sir.
Q. How soon after the accident?
A. I don't know how long exactly; might be six or seven hours after.
That is all.

200 In the Superior Court of the State of Washington in and for the County of King.

SAMUEL DIXON, Plaintiff,
vs.
FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Co., Defendant.
} No. 22200. Judge's Certificate.

STATE OF WASHINGTON, *County of King*, } *ss*:

I, Orange Jacobs, one of the judges of the above-entitled court and the judge before whom the above-entitled cause was tried, do hereby certify that the matters and proceedings embodied in the foregoing statement of facts are matters and proceedings occurring in said cause, and the same are hereby made a part of the record herein. I do further certify that the same contains all the material facts, matters, and proceedings heretofore occurring in said cause and not already a part of the record therein. I do further certify that the foregoing statement of facts contains all the evidence and testimony introduced upon the trial of said cause, together with all depositions, together with all objections and exceptions taken to the admission or exclusion of testimony, and that Plaintiff's Exhibits A, B, C, and D, and Defendant's Exhibit No. 1, hereto attached, are all the exhibits introduced upon the trial of said action.

Witness my hand this 3d day of April, A. D. 1897, in the presence of attorneys of record on each side.

O. JACOBS, *Judge.*

201 SAMUEL DIXON, Respondent,
vs.
FREDERICK BAUSMAN, as Receiver of the Rainier Power and Railway Company, Appellant. } No. 2581.

Filed July 8, 1897.

This is a case of personal injury sustained by the plaintiff, while in the employ of the defendant, by the breaking of a trolley wire which he was attempting to draw into position by means of a block and tackle. The span wire, which stretched from poles on the side of the street to the trolley wire, had become unfastened from the trolley wire at a curve, in consequence of which the trolley wire had sagged, while the span wire had fallen upon the ground. It was in pulling the trolley wire out to its proper place, so that the span wire might meet and be fastened to it, that the plaintiff was injured by the break.

There is no question that the injury was inflicted, and that it was severe enough to warrant the amount of judgment obtained, testimony showing conclusively that the plaintiff by reason of the accident had permanently lost the use of his lower limbs, and that he sustained numerous other injuries. There is no error alleged in the instructions of the judge, the admission of testimony, the refusal to admit testimony, or anything of that kind, but the real assignment of error is the refusal of the court to grant a new trial, on the ground of insufficiency of the evidence to justify the verdict.

There are really but two questions in this case for discussion. First, Was there such a defect in the wire as the master would be responsible for? and, second, Was the respondent guilty of contributory negligence? Many authorities are cited by the respondent and some few by the appellant to maintain their respective positions, but we think the summary of the law announced by the appellant may be accepted as the law governing a case of this
202 kind, viz., first, that the master, on the one hand, is not an insurer of his servant; second, the master, on the other hand, owes his servant a reasonably safe place to work in and reasonably safe appliances to work with; third, the servant, for his part, owes it to his master to take no unnecessary risks at work; fourth, the servant assumes the risks ordinarily incident to his occupation; fifth, the servant injured by a defective appliance must show that the master either knew of the defect or ought to have known of it beforehand.

We think this is a fair statement of the law, and on the principles herein enunciated applied to the testimony in this case the right of the respondent to recover damages must depend. It is evident from the testimony in this case that the pounding out of kinks in the trolley wire at the point where the accident happened had

weakened the wire and was the cause of the same breaking. This the jury found in answer to special interrogatories, and there is evidence beyond question to sustain the findings. We think there is also evidence that the knowledge of these defects was brought home to the managers of the company. It is stoutly contended by the appellant that this knowledge was not traced to the company, but outside of the evidence in the case, which we have before said we think was sufficient for the jury to pass upon, the defendant submitted certain interrogatories to the jury, among which was interrogatory No. 14, viz., "Did plaintiff Dixon's employer know of any such kinks at that place?" to which the answer was, "Yes." Again the same question is answered in the same way in interrogatory No. 18. These interrogatories were propounded, as we have said, by the defendant, and he cannot now question the correctness of the answers made by the jury thereto. If the establishment of these points were material to the judgment and there was no testimony upon these points which would be sufficient to sustain the judgment, then it was the duty of the defendant (appellant) to have moved the court for default, but, having submitted these questions to the jury, they must have been submitted upon the supposition that there was
203 testimony upon the subject and the defendant is bound by the answer. The same thing might be said of the alleged rotten condition of the wire; but, outside of the finding in this case, there was direct and positive testimony sufficient for the jury to act upon in the deposition of witness Newell (p. 146 of the record), who testified that the wire from Lake Union to the car barn, clear down town, either was rotten or of bad construction. The jury also found that the business of keeping the trolley and span wires in repair on this line of railway was not entrusted to Dixon by his employer up to the time of his injuries; that it was not a part of the duties of Dixon, in the employment of the railway company or its receiver, to do work repairing the trolley wire or span wire along the line of the railway, but that he was specially ordered or requested to do the particular repairing where he received his injuries by Superintendent Denny. These, it may be said, were also interrogatories which were propounded by the defense, and the finding of the jury on such interrogatories is final.

We have examined this testimony with considerable care, and have considered that the only close question in the case is the alleged contributory negligence of respondent. It seems that in repairing this wire he ran a construction car along the track to the place where the wire was broken, and not being able to reach the wire and fasten it from the top of the car, he placed a box upon the top of the car, and it was from this position that he fell when the wire parted and struck him, and it is contended by the appellant that he unnecessarily increased his peril by using this method of fastening the wire; that had he remained on the ground the wire would not have struck him, and several interrogatories tending to sustain this theory of the case were propounded to the jury, and it is contended that the answers to these interrogatories preclude a judgment in this case, viz., the jury found, in answer to interroga-

tory No. 11, that he could have tightened the trolley wire sufficiently for the task upon which he was then employed by standing
204 upon the top of the car at the time, and not upon the box, and that, in the event of the breaking of the trolley wire when he was standing on the box, he would in all likelihood be thrown from the top of the box to the street. Interrogatory No. 17 was as follows: "Could plaintiff Dixon have done this work more safely by standing on the street and not on the car or box while drawing the trolley wire back from the curve by the block and tackle?" to which the answer was, "Yes; but could not complete his work."

The jury also found that the respondent did not know of the rotten condition of the wire, or that any kinks had been hammered out in the wire, and that he did not know of the faulty condition of the wire in any respect. Interrogatory No. 10, which was propounded by the defendant, was as follows: "Was plaintiff Dixon, in tightening the wire by use of block and tackle, to stand upon a box or top of car from which he was thrown in the exercise of ordinary care?" to which the jury answered, "Yes." And, outside of the fact that we before indicated, that the defendant would be bound by the answer of the jury on interrogatories propounded by him, we think the whole testimony in this case shows that the answer was warranted. This was the apparatus which was furnished by the company for mending wires, the use of which it sanctioned and which was commonly employed, and unless we should be able to find that as a matter of law, regardless of the opinion of the jury, the manner of placing the strain upon this wire constituted negligence, we would be bound to affirm this case. The witness Alexander testified in substance that there was no place where a party could stand with perfect safety while mending this wire, and that while it might be more safe to stand below, yet he could not stand below and complete the work; that he could stand below and draw it into place, but could not stand below and make the tie, and it was doubtless in contemplation of such testimony as this that the jury answered interrogatory No. 17 to the effect that he could more safely do the work by standing on the street, but that he
205 could not complete the work from such position.

The testimony of John Burroughs (on p. 21, statement of facts) is to the same effect, viz., that it was not the usual way to do the work to stand on the ground, and that it could not be done in that way, but that the workman had to be up where he could take in the slack. The testimony of the respondent was to the same effect, and further stated that it was necessary because the top of the passenger car would not be high enough to reach the trolley wire and to work on.

Of course there is conflicting testimony on many of the points at issue in this case, but the only duty of this court is to ascertain if there was sufficient testimony introduced by the respondent to sustain the judgment or to warrant the findings or verdict of the jury, and outside of the special findings on the subject of contributory negligence, under all the testimony in this case, we are unable to

say that the acts of the respondent constituted contributory negligence, and that, as we before said, being the only question which we deem important, there is nothing left for this court to do but to affirm the judgment.

The fact that this is an action against the receiver and will constitute the respondent a preferred creditor does not change the law of responsibility of either the appellant or respondent. Affirmed.

DUNBAR, *J.*

We concur.

SCOTT, *C. J.*
ANDERS, *J.*
GORDON, *J.*
REAVIS, *J.*

206 In the Supreme Court of the State of Washington.

SAMUEL DIXON, Respondent,
vs.
FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Co., Appellant. } No. 2581. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of King county and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 15th day of September, A. D. 1897, on motion of John E. Humphries, Esquire, as counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed with costs, the petition for rehearing denied, and that the said Samuel Dixon have and recover of and from the said Frederick Bausman, as receiver of the Rainier Power & Railway Company, and from A. M. Brooks and W. J. Grambs, sureties, the costs of this action, taxed and allowed at $34, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

207 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frederick Bausman, as receiver of the Rainier Power and Railway Company, appellant, and Samuel Dixon, respondent, wherein was

drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of
208 a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

209 [Endorsed:] 2581. Filed Oct. 26, 1897. C. S. Reinhart, clerk.

210 UNITED STATES OF AMERICA, *ss:*

To Samuel Dixon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Washington, wherein Frederick Bausman, as receiver of the Rainier Power and Railway Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the

Supreme Court of the United States, this 14th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

211 Received a true copy of this citation for and on behalf of Samuel Dixon, defendant in error, this 27th day of October, 1897.

JOHN E. HUMPHRIES,
WILLIAM E. HUMPHREY,
E. P. EDSEN, AND
REMSBURG & ATKINSON,
Attorneys for Defendant in Error.

[Endorsed:] 2581. Filed Oct. 28, 1897. C. S. Reinhart, clerk.

212 In the Supreme Court of the United States.

FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Company, Plaintiff in Error,
vs.
SAMUEL DIXON, Defendant in Error.
} No. —. Bond.

Know all men by these presents that we, Frederick Bausman, as receiver of the Rainier Power and Railway Company, as principal, and W. J. Grambs and A. M. Brookes, as sureties, both of King county, State of Washington, are held and firmly bound unto Samuel Dixon, defendant in error, in the full and just sum of five hundred dollars ($500.00), to be paid to the said defendant in error, his heirs, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals this 20th day of September, 1897.

Whereas lately, at a session of the supreme court of the State of Washington, the highest court of record in that State, in a suit pending between the above-named parties, a final judgment was rendered in favor of the defendant in error and against the plaintiff in error, and the plaintiff in error, Bausman, as receiver, has sued out a writ of error from the Supreme Court of the United States to the supreme court of the State of Washington, which has been filed, with a copy thereof, in the clerk's office of the supreme court of the State of Washington, to reverse said judgment, and a citation directed to the defendant, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington, sixty days after date thereof:

Now, therefore, the condition of this obligation is that if said plaintiff in error, Bausman, as receiver, shall prosecute his writ of error to effect and answer all costs if he fails to make his plea good and pay to defendant in error Dixon all costs that may be adjudged

against plaintiff in error Bausman, as receiver, on appeal,
213 then this obligation shall be void; otherwise to remain in full force and effect.

FREDERICK BAUSMAN,
As Receiver of the Rainier Power & Railway Company,
(Signed) By FRED'K BAUSMAN.
W. J. GRAMBS.
A. M. BROOKES.

Signed, sealed, and delivered in the presence of—
—— ——.

STATE OF WASHINGTON, } ss:
County of King, }

Before me, Daniel Kelleher, a notary public in and for the State of Washington, duly commissioned and sworn, personally appeared W. J. Grambs and A. M. Brookes, who, being each first duly sworn, each for himself says that he is one of the sureties named in and who executed the foregoing bond; that he is a resident of King county, State of Washington, and that he is worth the sum of five hundred dollars, the amount specified in the bond, over and above his debts and liabilities, exclusive of property exempt from execution, in property situated within the State of Washington; that he is neither a counselor or attorney at law, sheriff, clerk, or other officer of any district or superior court or of any court whatsoever.

(Signed) W. J. GRAMBS.
A. M. BROOKES.

Subscribed and sworn to before me this 20th day of Sept., 1897.

[SEAL.] DAVID KELLEHER,
Notary Public in and for the State of Washington, Residing at Seattle.

Endorsed: Original. No. 2581. In the Supreme Court of U. S. Frederick Bausman, as receiver, plaintiff in error, *vs.* Samuel Dixon, defendant in error. Bond on appeal. Approved October 14th, 1897. (Signed) John M. Harlan, asso. justice S. C. U. S. Filed Oct. 26, 1897. C. S. Reinhart, clerk.

214 In the Supreme Court of the United States.

FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Company, Plaintiff in Error,
vs.
SAMUEL DIXON, Defendant in Error.
} No.—. Assignments of Error.

Comes now Frederick Bausman, as receiver of the Rainier Power & Railway Company, plaintiff in error, and says:

That in that certain cause pending in the supreme court of the State of Washington, in which the above-named Bausman, as re-

ceiver, is defendant and Samuel Dixon, now defendant in error, is plaintiff, manifest error, as shown by the record and proceedings therein, occurred, to wit:

I.

That the supreme court of the State of Washington erred in affirming the judgment of the superior court of King county, State of Washington, and in causing final judgment to be entered in the supreme court thereof upon the 15th day of September, 1897, in favor of plaintiff Dixon, now defendant in error, and against defendant Bausman, now plaintiff in error.

II.

That the said State supreme court erred in not reversing the judgment of the said King county court and in rendering any judgment whatsoever against plaintiff in error Bausman.

III.

The supreme court of the State aforesaid erred in affirming
215 the judgment against plaintiff in error Bausman, as receiver, because it appeared by the record and proceedings, upon the trial and at all times on appeal, that plaintiff in error Bausman, as receiver, defendant in the cause, did not employ plaintiff Dixon and was not liable to him as master or otherwise, as maintained in the complaint, and that the said Bausman, as receiver of the Rainier Power & Railway Company, was an officer of the United States circuit court for the district of Washington, and as such receiver was not liable to plaintiff Dixon, either as master or otherwise.

IV.

The supreme court of the State of Washington also erred in the above-entitled cause in rendering judgment against defendant Bausman, now plaintiff in error, because it manifestly appeared by the facts developed at the trial of said cause and at all times during the appeal that plaintiff Dixon received his injuries entirely through his own fault and without any neglect or negligence whatever on the part of the present plaintiff in error.

V.

That the supreme court of the State of Washington erred in not reversing the judgment of the superior court of King county and requiring a nonsuit to be entered in defendant Bausman's favor, as by him moved for in the trial below and renewed upon appeal.

VI.

That said supreme court erred in not reversing the judgment of the superior court of King county and requiring that court to enter a verdict in favor of defendant Bausman according to defendant's motion to that effect made at the trial and renewed on appeal.

216 VII.

All the foregoing errors involved the duties and liabilities, immunities and privileges, of an officer of the United States, inasmuch as it appeared by the pleadings and record in said cause, both in the lower and upper court, that defendant Bausman, as receiver, had been appointed by and was acting under the authority of the United States circuit court for the district of Washington and claimed an immunity and privilege thereunder.

Wherefore plaintiff in error prays that the judgment of the supreme court of the State of Washington and the decision rendered by that court in this cause be reversed, and that judgment upon the record therein be entered in favor of plaintiff in error Bausman and against defendant in error Dixon.

BAUSMAN, KELLEHER & EMORY,
Attorneys for Plaintiff in Error.

217 [Endorsed:] Original. No. 2581. In the Supreme Court of U. S. Frederick Bausman, as receiver, plaintiff in error, *vs.* Samuel Dixon, defendant in error. Assignments of error. Filed Oct. 26, 1897. C. S. Reinhart, clerk. Bausman, Kelleher & Emory, attorneys for —— ——, 626–'7,–'8 Bailey building, Seattle, Wash.

218 In the Supreme Court of the State of Washington.

FREDERICK BAUSMAN, as Receiver of the Rainier Power & Railway Company, Plaintiff in Error, *vs.* SAMUEL DIXON, Defendant in Error.	Certificate of Clerk.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing contains a full, true, and correct transcript of the entire record in the above-entitled cause, and that in pursuance of the writ of error heretofore filed in my office I herewith transmit the same, together with plaintiff's original Exhibits A, B, C, and D, filed in said cause, the original writ of error, the original citation, and the original assignment of errors, to the Supreme Court of the United States.

Seal of the Supreme Court, State of Washington.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court, at Olympia, this 12th day of November, A. D. 1897.

C. S. REINHART, *Clerk.*

Endorsed on cover: Case No. 16,725. Washington supreme court. Term No., 197. Frederick Bausman, as receiver of the Rainier Power and Railway Company, plaintiff in error, *vs.* Samuel Dixon. Filed November 22nd, 1897.

No. 197

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1898

FREDERICK BAUSMAN AS RECEIVER OF THE RAINIER POWER AND RAILWAY COMPANY,

Plaintiff in Error,

vs.

SAMUEL DIXON.

In Error to the Supreme Court of the State of Washington

BRIEF FOR PLAINTIFF IN ERROR

THE JURISDICTION OF THIS COURT.

Plaintiff in error, in the lower court defendant, was sued as and alleged to be the federal receiver of a street railway. This he admitted. It was next alleged that his predecessor in office had hired the plaintiff Dixon, and by negligence caused his injuries. Both these things were denied, and defenses were raised of assumed risk and contributory negligence. Motions by defendant for non suit and for a verdict in his favor were overruled. A verdict of $10,000.00 being rendered in favor of plaintiff, the federal receiver appealed to

the Supreme Court of the State of Washington, where he assigned with other errors the refusal to grant a non-suit and to direct a verdict (See original brief in that court now on file). From the adverse judgment of that court he prosecutes his writ of error here.

A motion is made to dismiss this writ on the ground that no federal question is involved.

Plaintiff in error, being a federal receiver, may, in our opinion, seek this court from an adverse decision of the state court of last resort upon the question whether he was negligent as matter of law in the discharge of his duties as an officer. That a federal receiver is a federal officer this court has fully decided under the removal acts, and, if he be an officer for the purposes of one act, we do not see why he should not be for the purposes of another, since it cannot be contended that there is anything in the removal statutes themselves affecting the definition of officer. Of course we are not saying that the officer's right to come here from the state court is to be judged by his right to remove to the circuit court. Not at all. The statutes are different. What is a federal question under one may not be a federal question under the other, but a federal receiver would be an officer under both. The receiver, in a word, is to be viewed very much as a marshal would be in resisting the present motion.

Has, then, the federal officer under the foregoing circumstances a right to have this court review the adverse decision of the state court? If he has such a right, it must, of course, be found in Section 709 of the Revised Statutes, the familiar 25th section of the Judiciary Act. It is accordingly our contention that we come within those provisions of that section which give this court jurisdiction when there is drawn in question the *validity of an authority exercised* under the Uni-

ted States, and when a federal *right*, or *immunity* is set up and claimed under a federal commission held or a federal authority exercised.

As to *validity of authority*, that, we contend, is just as much drawn in question here by our denial that we, the federal officer, had ever employed the plaintiff as in *Buck vs. Colbath*, or *Etheridge vs. Sperry* the validity of a marshal's authority was drawn in question when the other side admitted that he was the officer he claimed to be and had the valid writ he claimed to have and when the only questions involved were the purely legal and general questions whether, in the former case, an officer (of any court) could seize the wrong property, admit the mistake, and yet find justification in a writ not specifying particular property, and, in the latter case, whether the property he seized had already been rightfully or fraudulently conveyed to others by chattel mortgage. As to *right* this is drawn in question here because the federal receiver not only denies the hiring of plaintiff but sets up affirmative defenses of assumed risk and contributory negligence, so that his denials and his affirmative matter clearly constitute a claim set up of due execution of his official functions, a claim of right under a federal authority or commission.

The language of the section, it will be argued against us, allows a federal officer to bring error here to state courts only when the validity of his authority is denied, or when his right, privilege or immunity is claimed *because* he is the officer. We claim that the language means whenever he *is* an officer, *and* claims a right privilege or immunity arising out of his official transactions. The framers of the act never intended, in our opinion, that the suit in the State court against a federal officer, if based on an admission that the officer was the offi-

cer he claimed to be, and that he had the process he claimed to have, would escape the jurisdiction of this court, while assessing damages against him on something inseparable from his official acts, simply because the officer could not say that any particular federal statute protected him and claimed protection *as* an officer under general laws. "Right," in our view, includes any adverse official claim or contention, "immunity," exemption from the claim of plaintiff against him *as* an officer, not mere exemption from the court in which it is prosecuted or from suit at all, "validity," propriety of action or behavior. And this right and immunity are "specially set up and claimed" when the federal officer, though not claiming the protection of any particular statute and though not claiming exemption *because* he is an officer, denies that *as* an officer he is liable and *as* an officer was in the wrong.

Suppose a federal marshal is sued in the State court by an execution creditor for loss of goods held by him for that creditor under levy. He sets up, or the creditor sets up against him to begin with, that he is a federal marshal and that he held the goods as such. His authority, far from being in question for a moment, is as much insisted on by those who sue him as by himself. Nor is the title to the goods in question. The sole defense of the marshal is that he was not to blame for the loss, that he was not negligent. Or, suppose the marshal is sued for the proceeds of a sale by the creditor for whom he made the sale, or by a deputy for compensation, or by a prisoner for mal-treatment. These are cases of official acts which illustrate the receiver's position here. They are not cases in which the marshal can say that any federal statute protects him either from suit in that court or from any liability wherever sued. They are

not like those in which the marshal levies on the wrong goods or arrests the wrong person, in which cases the validity of his authority in the technical sense is more or less obviously called in question. Surely, though, the Judiciary Act allows review here of errors of law in the one class as well as in the other. If right, immunity, and validity are to have a confined, an unnecessarily confined, meaning, the marshal cannot come to this court in cases of the former sort at all.

If the 25th section of the Judiciary Act of 1789 did not mean that we can come here in cases like the present, then during nearly a century it left federal officers, in the situation of this receiver and in the supposed position of the marshal above, at the mercy of state decree. Right of removal under the removal section (12th) of that act they had none. Not until 1875, in section 2 of the removal act of that year, was the right of removal conferred upon federal officers, who then first got it, not by express language but indirectly, through the removal of questions "arising under the laws of the United States," *Fiebleman vs. Packard* 109 U. S. 421, being apparently the first case of that kind. Nay more, under the original judiciary act federal officers were not only unempowered to remove from state to federal circuit courts, but the latter courts could not even get jurisdiction of them in an original suit and in *Slocum vs. Mayberry*, 2 Wheaton at page 10, we find Chief Justice Marshal remarking:

"Congress has refused to the courts of the Union the power of deciding on the conduct of their officers in the execution of their laws, in suits at common law, *until the case shall have passed through the state courts* and have received the form which may there be given it."

It is, accordingly, quite plain that under the original judiciary act a federal marshal or a federal receiver sued in dam-

ages officially for negligence in the discharge of his duties could be sued only in the state court and that from this he could not remove to the lower federal court. In no way could he get to the court of his own government except by writ of error to the highest state court. Now, shall it be said that he could not go there either unless he would allege, what in many cases he manifestly could not, that he was exempt *because* he was the officer, that he could not go there at all if the validity of his authority was conceded, his writs both as to form and extent unquestioned, the jurisdiction of the lower court undenied?

Now, the power to decree a liability involves, like the authority to tax, the power to destroy, and an officer of another government can be annihilated just as much by pecuniary decrees which he cannot dispute as by decrees that deny the existence of his authority or the technical validity of its use. We must, therefore, in getting at what the framers of the Judiciary Act had in mind, remember that in all human probability they had the sagacity to see this, that they did intend to afford to officers of the United States, no matter in what way sued in a state court, a hearing somewhere in their own tribunals, provided they were sued as officers, and that, as they gave none by removal, they bestowed it in appeal. Having this in view we have no hesitation in maintaining that the framers of that famous act believed that they had covered in section 25 every possible situation of a federal officer involved in the courts of a state, and that, whenever he resisted liability as an officer there, he had a right to come here. Otherwise we must believe that they left their officers in many cases subject to being completely penned in the courts of the states.

But, it will be contended, the later removal acts do now

confer this right of removal, so no harm any longer exists. This, in the first place, affords no answer to our argument as to what was meant by section 25 when enacted, and, if it meant what we say it did then, of course it means that today. In the second place, no removal acts have in all cases supplied this right. A marshal, or other federal officer, cannot remove even now if the amount involved be less than two thousand dollars, so that unless our interpretation of section 25 be correct, a federal officer sued in a state court for as much as nineteen hundred dollars cannot even now have his acts reviewed in the courts of the government whose commission he holds, so long as the person suing him admits or alleges that the officer's authority was valid.

The receiver is sued here *as* receiver, and this suit involves a consideration of those duties which this officer of the federal court has taken oath and given bond faithfully to discharge. The judgment, too, must weigh upon, consume, or, perhaps, annihilate the assets in the hands of the federal court. The federal officer, accordingly, seeks an ultimate review in the courts of the government that created him. This, we say, is allowed him by the 25th section.

But, it is next argued, this court cannot go into the question of fact as to whether or not the defendant is liable. Certainly not, if it be a question of fact. Whether the defendant is liable or not is, however, a question of law. To be sure, this court cannot examine the verdict of the jury and say whether or not it is against the weight of the testimony, but it can say whether or not our motions for a non-suit and for verdict for defendant should have been granted. Whether the lower court was right or wrong in denying these was a question of law.

Possibly it is meant by the other side that even the legal

question of the receiver's liability cannot be considered here, but there is no other question in the case. Being inextricably involved with the federal question of course it must be determined. (*Stanley vs. Schwalby*, 162 U. S. 255.)

It may, perhaps, be suggested against us that the claim of our being a federal receiver is not alleged by us. It is alleged, though, by the other side, and, if it would have strengthened our case to make the allegation ourselves, it will hardly be contended that the plaintiff would be allowed to cheat us of that advantage by alleging it in advance and leaving us only the right to admit it. From the view we take of our right to come here under the 25th section, however, it is enough that we are sued *as* receiver, that the judgment is to bind us as a federal officer, and that the whole controversy is over an official act. Denying liability as an officer, the receiver here has "specially set up and claimed" a right and immunity under the statute.

No decisions of this court expressly support our argument. On the other hand no decisions of this court disagree with it. The spirit of those decisions, we contend, is with us, and the manifest purpose of the statute. *Buck vs. Colbath*. 3 Wall., 334, is clearly with us as to when validity of authority is called in question. Indeed, whenever the case is cited that seems to be the point upon which jurisdiction is supposed to have been sustained. "Immunity" in the most technical sense, however, was there claimed in an instruction which the marshal requested of the state court that it had no right to entertain the suit against him at all. That claim of exemption from any suit may have been what sustained the jurisdiction, but we hesitate to think so, as it was plainly untenable. Will it be said that even flimsy pretenses of immunity made below will sustain the jurisdiction above, that a federal defendant

can say the state court has no power to sue him when he knows it has, and knows, too, your Honors will say it has, and yet get a hearing here? In *Etheridge vs. Sperry*, 139 U. S., 266, exactly similar to the *Buck* case, the pretense of total immunity from state process was certainly flimsy, if it was not flimsy in the other and prior case, for in *Buck vs. Colbath* you had already said "we see nothing in the mere fact that the writ issued from the Federal Court to prevent the marshal from being sued in the state court." If, therefore, the marshal in *Etheridge vs. Sperry* got jurisdiction here by claiming that the state court had no jurisdiction to sue him, he got it by a manifestly erroneous, a manifestly untenable claim. As well might the receiver here have claimed that the state court had no power to sue him because he was a federal receiver. This would be a plainly bad contention and yet not more so than the marshal's claim in *Etheridge vs. Sperry* that the state court could not sue him. Surely this court is not going to say that federal officers, who could not otherwise get to this tribunal from a state court, may still do so if they will make untenable and even untruthful denials of the state court's jurisdiction. We therefore conclude that the jurisdiction in *Buck vs. Colbath* and *Etheridge vs. Sperry* was sustained on the question of validity of authority, in which event we deem ourselves supported by those decisions. One other case remains to be mentioned, *Day vs. Gallup*, 2 Wall. 971. That decision contains nothing affecting the present contention and we would not cite it at all if it were not referred to in *Buck* vs. *Colbath* in a way that might mislead, for in that reference the court omits the important fact that the federal marshal had ceased to be a party before the case even reached the State Supreme Court, that it had been dismissed as to him *before it went to the jury*. This fact is distinctly

referred to by Justice Wayne (see pages 98 and 105 of that report). All that was there decided was that the defendants left in the case after the federal officer went out of it could not come here from the state court.

The motion to dismiss should be denied.

BRIEF ON THE MERITS.

To state this case briefly, Dixon, an employee on a street-railway, was injured by the breaking of a trolley-wire. He was thrown by it from a loose box on top of a street-car, where he was engaged in putting a strain on the wire by means of a block and tackle in order to draw it into position. It seems that one of those support wires, technically called span wires, that stretch from poles on the side of a street to the trolley-wires of electric street railways, had become unfastened to the trolley-wire, at a curve and that the latter wire, in consequence, had sagged to the inward side of the curve, while the span wire had fallen upon or towards the ground. It was in pulling the trolley-wire out to its proper arc, where the span wire might be made to meet and be fastened to it again, that the workman was injured. (See cut at page 96).

The accident happened two days after the railway had passed into the hands of Receiver Bausman's predecessor, Backus, and the controversy as to where the fault lies may be summed up as follows:

Dixon maintains that there was a pounded out kink in the trolly-wire at this place rendering it weaker.

On this there appears to be a conflict in evidence, but the jury had, of course, a right to find against us, so it will be useless to resist on this point further. We may now divide the subject thus:

I. Dixon alleges that Receiver Backus or his agents

knew of this treatment of the kink, though pounded out not during the receiver's or even during his predecessor's, the company's, operation of the properties, but during the original construction by the contractor.

We contend that we had no such knowledge, and that the defects were too small (which the jury conceded) for any ordinary inspection to disclose.

II. Dixon, though alleging himself an electrician on the railway, maintains that he was acting out of his usual employment, and was specially ordered to do this work by the manager.

We contend that he was doing what he was paid to do, what he knew how to do, what he did on this occasion without any special order whatever, and what he had been doing for months without objection.

III. Affirmatively we, for our part, maintain that Dixon assumed a position of needless and open risk by pulling on the trolley wire from the top of the car, and, still worse, from the top of a loose box, when he could have done this from the street below with scarcely any risk at all, and then have mounted the car to fasten the wires together.

In the following statement we shall frequently refer to the findings of the jury, not in order that they may be reviewed here, but to illustrate the points of fact involved, the more especially as the opinion of the State Supreme Court itself deals with nothing else.

I. *Our alleged knowledge of the defect.* As to whether the receiver or his servants had any knowledge of defects in the trolley-wire, the facts are as follows: The railway, as to its management, had passed through three stages. *First*, it had been in the hands of one Baker, a contractor, during its original construction (p. 30, 38, 35). *Second*, it passed into the

hands of the Rainier Power and Railway Company. *Lastly*, at the time of the accident, it was in the hands af that company's receiver. The pounding out of the kinks, the negligence relied on here by Dixon, occurred while the road was in the hands of the contractor (p. 30) That the company or its successor, the receiver, ever caused the pounding out will not be claimed by Dixon, and it cannot be claimed, either, that those who did the pounding out ever became the employees of the receiver. The jury specially found that the defect was one which ordinary inspection would not disclose. The names of the contractor's servants, who pounded out the kinks, were Wooding, Stocks and Alexander (p. 113, 30, 36), and Alexander appears to have called the kinks to the attention of the contractor's superintendent, Wolfe. Of these three who did the pounding out Wooding died (p. 113) and nothing further concerning him appears; Stocks, after the contractor's period, became the company's line repairer (p. 43), and Alexander is not shown to have had any further connection with the road. Thus Stocks alone remained with the road after the company took charge. Even he, however, did not remain until the *receiver* came in (p. 51). He left the company some months before the accident (p 51), which, it will be remembered occurred just two days after the receiver was appointed. As to Wolfe, he subsequently appears in the employ of the *company*, but the only definite description of his connection with it appears to have been a job of shovelling snow (p. 69, 70, 75-6), nor did he, either, remain until the receivership (p. 43). Dixon, it is to be remembered, seeks to recover from the receiver *as receiver*, not as the successor and representative, but as himself, the employer and we now find that not one of the servants of the contractor ever became a servant of the receiver. The jury in a special finding (p. 21)

reported that D. Thomas Denny was the receiver's employee who knew of this defect. Now, it is very doubtful whether the jury would have a right to find that Denny was even in the employment of the receiver before the time of the accident, much less that he knew of this pounded out kink. He had been the *company's* manager up to the receivership, but the testimony is that is was not until two or three weeks after the receivership that the receiver employed him and that during the two days from the receiver's appointment to the date of the accident he was at home with a cold (pp. 66, 74). If there is any contradiction to this, it is the solitary statement of Dixon himself (p. 43) which does not appear very positive. But whether Denny was then in the receiver's employment or not, we may now pass to consider whether he knew of this little defect in a whole line of street railway wire. There is not a shadow of testimony to show that he knew of it. There is not a shadow of testimony to show that he ought to have known it. It will not be even claimed that he had anything personally to do with the pounding out and there is nothing to show that his attention was ever called to it. He does not appear even to have been a servant of the contractor under whom this pounding out occurred, and his first connection with the road appears under the company. We have already adverted to the jury's concession (p. 20, No. 7) that ordinary inspection of the wire would not have disclosed this defect. No testimony at all was introduced to show that the receiver or the company before him had failed to make inspection in any degree whatever, so that notice to charge the receiver here must be actual through his agents.

The charge of defects in the wire seems to be confined almost entirely to the defect of a pounded out kink. One witness, however, for Dixon swore to general rottenness, and

the jury especially sound that such was the condition of the wire. The weight of the testimony is certainly against this (pp. 65, 80, 82) but the matter apparently is immaterial because it was the kink that broke (p. 113). Plaintiff, we may add, made no attempt to show that rottenness would be visible so that the employer could by reasonable vigilance provide against it. The defense, on the other hand, proved that such defects are generally not visible (pp. 66, 82), that no accident had ever occurred at this curve before (p. 115), that the wire was purchased of the General Electric Company, a standard company in electrical supplies (p. 64-5), and should have been good for between seven and ten years (p. 83). No attempt was made to fasten any *knowledge* of rottenness on the receiver, or as we have said any want of inspection. It was only of the pounded out kink that actual knowledge was sought through the chain we have described, to be brought home to him through his employees. Nor was any explanation offered why Dixon, an electrician, should not perceive rottenness, if visible, as well as his employer.

II. *As to the scope of Dixon's Employment.* Dixon claims that in making the repairs he was in a special and not in his usual employment, but the testimony stands as follows: Dixon had worked for the railway a considerable time. His official designation, according to the manager (p. 64), was barn foreman, and according to himself (p. 42) he was to take care of the cars, and repair the woodwork, machinery and wiring in the car barn, or, according to his complaint (p. 2, par. 4) he was the *electrician*. About four months before the receivership and the accident, Stocks, already referred to, left the service of the company. Stocks had been doing the line repairs along the road (p. 43). After his departure Dixon, according to the manager's story (p. 64) and the superintend-

ent's (p. 72), was the man on whom this work devolved, and they testified that from that time on he always did it (pp. 78, 65), that he was a perfectly competent man to do it, and one on whom they relied. In addition to this five superintendents of street railways testified, without rebuttal or contradiction, that it is the duty of a barn foreman to do such work without special orders (pp. 64. 84, 87, 92, 94). Finally, that he was working under *general* orders seems to be put at rest by his own admissions (pp. 52, 46), that he had orders from Mr. Denny after Stocks' departure to look after these repairs himself. Nay, we find him by his own story frequently doing work with wires along the line (pp. 99, 51, 44). As he expressed it (p. 52), Denny had told him "whenever there was a break down or anything of that kind, to go and do it," or (p. 46) "any time a little break like that occurred to go out and fix it, or in case a car got off the track, or anything, I should go out and help the men get it on," and, as we shall now see by his own story (pp. 44, 51) and that of his attendant (p. 40), he went out on this occasion without orders from any one in a manner that places it beyond question that he deemed this a part of his business. Backus, the receiver, as appears by the complaint (p. 1, par. 2), was appointed on the 13th of June. The accident occurred on the 15th. The receiver consequently had been in possession, at that time, two days. On the morning of the 15th, a *motorman or conductor* (p. 44. 51) according to Dixon's own story, reported at the car barn that lines were down at the corner of Depot and Stewart streets, where the accident subsequently occurred, and at one other place. Dixon forthwith without orders from any person called one Henry to assist him, took a car used for such work, and went out to make the necessary repairs. This is his own explanation as to why he went out that morning.

Henry, his attendant, tells the same story (p. 40). Nobody tells a different story. The manager (p. 63) and the superintendent (p. 73), even corroborate him by stating that they gave him no order about it at all. But Dixon in his complaint (p. 3, par. 12), alleges that he was expressly directed to go there by Mr. D. Thomas Denny, the company's manager, and the jury in a special finding (p. 19, Nos. 4 and 5) and in the face of the man's own story, found that Dixon was specially directed to go there and by D. Thomas Denny. They also specially found (p. 19, No. 2), in almost equal defiance of the testimony, that to repair the trolly or span wires was no part of Dixon's duties

No attempt was made by Dixon to show that any one else than himself ever did this work after the departure of Stocks. No attempt was made by him to show that this work was work which he did not understand or which he was unequal to performing perfectly well. No attempt was made to show that it involved more hazards than his electrical work at the barn. No attempt was made to show that the work was to be only temporary. What he does attempt to show, in his own testimony only, is merely that it was not often that he had to go out on these errands and that generally, Denny or the superintendent *was with him* when he did, a detail in which the others contradict him (p. 69, 74) and with which his own story in other places does not agree (pp. 124, 43-4). Even he, however, did not claim that Denny or the superintendent went with him always. At no time, moreover, did he ever object to such work (p. 65), and by his own statement (p. 51) Stocks had been gone between two and four months.

III. *As to the alleged contributory negligence.* Now as to the work to be done by Dixon at that place. On this point there appears to be no difference of opinion. He was to

make the trolley-wire taut by the block and tackle, that is, restore it to its true curvature by an outward strain, and then take up and fasten to it the fallen span wire. Here occurs the defense of contributory negligence and of assumed risk. The contention of the receiver is that Dixon could have done the first of these things, that is, could have applied the strain to the trolley-wire and brought it into position, by pulling on the block and tackle *from the street*, that to do so from the top of the car was dangerous, and from the top of the box more dangerous still, and that Dixon should have ascended the car to make the connection between the two wires only *after* having made the trolley-wire taut from below, the chief danger of a break in the latter being while the strain was being applied. This question is not to be confounded with another which occasionally appears in the testimony—as to which is the proper *side* of the wire to stand on in pulling. The controversy here is as to whether Dixon while pulling should have stood on the *street* instead of on the car and on the box also. Eight witnesses discuss this question, three for the plaintiff in opening, five for the receiver in defense, and none for plaintiff in rebuttal. Of the three on Dixon's behalf, one Alexander (p. 34), testifies against him, Dixon himself admitted (p. 48) that it might be done from the street though he said he had never seen it, and the third, Burroughs, (p. 38) admitted it would be *safer* below and that if he stood far enough underneath it wouldn't hurt him," but added, what is not at all at variance with the receiver's contention, *that all the work* could not be done that way. That it was safer to make the trolley-wire taut from below was not denied by anyone. It is observable, moreover, that none of these witnesses for Dixon gave any opinion at all as to whether, in making taut, it was necessary to mount the box also after

mounting the car. The utmost that can apparently be said of their testimony is that it might be usual or permissible to pull from the *car*. The box, according to Dixon (p. 53), usually went with the car, but he does not say that it was ever used before to stand on during the strain. On the other hand, five witnesses for defendant, all experienced men, testify that the safe way, and a perfectly practicable one, is to make the trolley-wire taut from the street and then to mount the car to make the fastening, the principal risk from a break in the trolley-wire being then over. (pp. 80, 83, 88, 93, 95). The box would be useful to mount in making the connection after the wire had been strained from below. The same witnesses unanimously testified that, at any rate, to pull the trolley-wire taut from the top not only of the car but also of the box greatly added to the danger, "a position of very considerable peril" (p. 81). To this no rebuttal was offered. A trolley-wire, it was in evidence, frequently breaks (p. 82) and at all events is liable to do so at a curve (p. 73) and at this curve there was a great strain (p. 37). Now let it be observed that the box was sixteen or eighteen inches high and that the broken trolley-wire struck Dixon on the face or neck (p. 45) and see that if the man had been pulling even from the car top, the wire would have passed over his head. The jury found, (p. 20, No. 7) that Dixon could have drawn the trolley-wire more safely from the street, but added that he could not have completed his work there. They have found epecially (id. No. 12) that if the trolley-wire should break while he was standing on the box he would probably be thrown to the street. It was while the block and tackle was being applied that the break occurred, not in the act of connecting the two wires (p. 3, par. 15). The jury specially found (p. 20, No. 6) that Dixon did not examine the condition of the trolley-wire before ap-

plying the strain to it. They then added (id. No. 7) *that ordinary inspection of it by him would not have enabled htm to perceive the defect*, a finding doubtless supposed by the jury to be friendly to Dixon, but, we cannot help observing just here, exceedingly unfavorable to his charge of negligence against his employer. No testimony whatever was introduced to show that the receiver, or even his predecessor, the company, had failed to inspect the wire.

The receiver moved for non-suit and for a verdict for defendant, both which motions were overruled. The jury returned a verdict of $10,000 for Dixon. The receiver then made a motion for a new trial on the ground of errors of law in the trial, and of the insufficiency of the evidence. This being denied and judgment entered, he appealed to the Supreme court of the state.

SPECIFICATIONS OF ERROR.

The lower courts erred in not directing a verdict for the defendant because:

1. There was no evidence of negligence by defendant or that he knew of the defect that caused the injury.
2. The plaintiff was guilty of contributory negligence.

ARGUMENT.

A long citation of authorities in negligence cases is generally unprofitable. Each case of that sort must stand upon its own facts and we will therefore discuss our specifications of error very briefly. In this discussion, as in our statement of the case, we shall from time to time allude to the findings of the jury, this not by way of inviting this court to review them, but to expose that defiance of the testimony on which

the court below, as well as the jury, must have decided against us.

I.

OUR ALLEGED KNOWLEDGE OF THE DEFECT.

If Dixon can recover in this case, a severe rule indeed is established against employers. No attempt even is made to prove want of inspection. Nay, more, the road had been used safely for nearly a year, had passed through two hands, and even the jury were forced to find (p. 20, No. 7) that the defect complained of is one which ordinary inspection would not disclose.

Now let us look at the obvious law of this thing. If ordinary inspection would not reveal this pounded out kink, then, of course, it was not one of those plain, visible, defects which the law presumes a master sees whether he actually does so or not. But, if it cannot be *presumed* that we saw it, Dixon must show that we actually did see it. Negligence is never presumed. He must show that we either *ought* to have known of this defect or that we did not know of it. To say that we ought to have known of it in the face of the record certainly will not do. Now, then, did we actually know of it, and through whom?

Through Denny, said the jury (p. 20, No 18), and if the court that refused to direct a verdict for us had been called upon to name any other source of our knowledge, it must have given one equally indefensible. We simply ask the court to review our account of this in part I of our statement of the case. There Your Honors will surely perceive that the attempt to fasten knowledge on us through Denny has utterly failed, both because of their failure to connect the contractor with

the receiver through Denny and because of the utter absence of any showing of Denny's ever knowing of the defect himself. Nor is there anyone else than Denny through whom, with the slightest plausibility, this actual knowledge can be made binding upon us.

As we said before, each case of this kind must be judged by its own facts, and never was knowledge actual sought to be fastened upon employer by a more tortuous and shadowy chain than here.

We do not overlook the fact that the servant does not assume the risk of defects that are hidden, but this does not mean that for every defect that is hidden the master is liable. Very far from it. The servant injured by a defect latent gains this in proving it latent, that he has freed himself from the charge of assumed risk, but still he has not gotten so far as to show that the master is in fault. The master may honestly say, "Yes, you could not see the thing and so you are not at fault. But neither am I. I never knew of this condition of affairs or by reasonable inspection could have found it." In other words it is an accident. Thus the language frequently found in the books is perfectly in harmony when they say, in one place, that the master is not liable for defects unless he actually knew of them or by the exercise of ordinary care could have known of them, and in another place, that the servant assumes no risk of defects latent. If the master was liable every time the injury resulted from a latent defect, without regard to his knowledge of it, actual or presumed, he would become an insurer—become liable without a duty omitted.

Some stress was laid by Dixon's counsel in the lower court on the fact that Dixon was not a servant having the duty of inspection. This, for the sake of argument, might

be readily enough conceded. Let it be conceded that it is the master who must inspect. It would not follow either that the master omitted inspection, our want of which is nowhere shown, or that ordinary inspection would disclose it. Cases are scarcely necessary on the law of this branch of the case at bar. As to the duty of *plaintiff* to show want of inspection we may, however, cite the following:

A brakeman was injured by the breaking of a brake-chain and a refusal of non-suit was held error because it was *not proved* that a proper examination had *not* been made; *or that an examination would have discovered the defect..*

DeGraaf vs. N. Y. C. & H. Ry. Co., 76 N. Y., 125.

Speaking for the unanimous court Judge Church says: "Railroad corporations should be held to a high degree of care and responsibility, but there is a point beyond which the requirements would be regarded as unreasonable and oppressive and would in effect make them insurers."

A much later case in the same court is

Carlson vs. Phoenix Bridge Co., 30 N. E., 750

in which the court, distinguishing between a carrier's duty to a servant and that to a passenger, defines the former "reasonable care," and would not hold defendant liable for the breaking of an iron hook though no special test of it had been made after purchase from a standard manufacturer. In our own case the wire was purchased from the General Electric Company, a standard supply company, and should according to the testimony, have been good between seven and eight years.

II.

CONTRIBUTORY NEGLIGENCE.

This is our second specification of error.

Our statement of this branch of the case surely constitutes its own best argument. Some men may question whether Dixon's negligence contributed to the injury, but we do not think reasonable men will. One thing is certain, if he had pulled from the top of the car and not have done so from the top of that box, the wire would have passed over his head. Why stand on the box at all? Why should the servant, doing that which is surely not careful in his work, be held blameless, while the master, as to knowledge of the defect, is to be held guilty here by so ingenious a chain of fact? Are not both equally bound to that only which is reasonable? Why should so much liberality be extended to the one, such severity imposed upon the other? We submit with confidence our narrative of Dixon's conduct and duties and ask whether this man has behaved with reasonable care. He did not even cast his eyes over the wire to see if it was in good condition before applying the strain (p. 20, No. 6). Then he takes the point of highest exposure and, to do the most dangerous part of his work, takes the most dangerous place.

III.

THE OPINION OF THE STATE COURT.

The lower court states (p.) that "there is no error alleged in the instructions." This is a mistake. We alleged error in the State Supreme Court on the refusal of the trial court to direct a verdict. (See our original brief).

It is evident the State Supreme Court did not consider this case from that standpoint to any great extent. They only considered whether the jury had not made good certain deficiencies of the testimony. However, they do state that "there is also evidence that the knowledge of these defects (kinks) was brought home to the managers of the company." Company? The company is not the defendant here. The receiver is the alleged employer. Dixon himself would refuse to accept a verdict against the *company*. It is the receiver and the estate that he seeks to charge with a preferred lien. Our very point always has been this distinction, and that, even if it be possible to trace the knowledge from the contractor's period to that of the company, it is impossible to trace it to the employer *receiver*. Did the State Supreme Court mean that this knowledge reached the manager of the receiver? They did not say so.

In our opinion they could not say so. Never was knowledge of a latent defect sought to be traced to an employer more unfairly after two changes of masters and after a year's operations.

As the state court refers so often to the findings of the jury, we can not avoid making here our perhaps superfluous protest against the manner in which that court attempts to close our lips against the manifest falsity of some of them. A number of the answers or findings, it is plain from the court's own opinion, were unsupported by any testimony whatever. Grant that, says the lower court, you had no business, then, to ask them, and, if you got a false answer, you are bound by it. Why? Is not the admitted purpose of special interrogatories to make the jury so state their views in detail that, if they perversely and erroneously give a verdict to the wrong party, it may be corrected by reference to the

interrogatories answered? If this be true, interrogatories may well be asked on all the points necessary to sustain that verdict. If, in a suit on a promissory note, delivery be in issue and there be no evidence of that, may we not properly ask the jury whether the note was delivered? The expectation is that, answering truthfully, they will say it was not, and then if they return verdict for the other side nevertheless, the special finding will correct the verdict. This is clearly the purpose of interrogatories. (Walker vs. New Mexico etc. Ry., 165 U. S. 593. Bellford vs. Spokane etc. Ry., 9 Wash. St. 55). But, says the State Supreme Court, if there was no testimony on that point at all, you should have moved "for a default." Default, how and when? Nothing in the laws or decisions of the state throw any light on this language. By default, does the court mean non-suit? That we moved and were overruled (p. 60). Does it mean a peremptory instruction? That also we did and it was denied us (p. 107). Does it mean a motion to set aside the verdict? That also we did and to no purpose (p. 21). Does it mean a verdict *non obtante veredicto*? That we did not do, and how could we do it when the jury had protected themselves by making false answers on these very points? As in the supposed case of interrogatories concerning a promissory note, if the jury should falsely answer that the note was delivered when it was not, the answers would be consistent with the general verdict and a motion for verdict the other way upon the answers would manifestly be wrong. We are utterly at a loss to know what we were to do under this moving "for a default."

Why does the lower court seize on the solitary remark of one witness that the wire was generally rotten (against the weight of the testimony) when, at all events, it has conceded that the cause of this man's injuries was not the rottenness but

the pounded out kink. "It is evident that the pounding out of the kinks in the trolley-wire at the point where the accident happened had weakened the wire and was the cause of the same breaking." The cause of the trouble here was this kink and the question is whether the receiver did know of it or ought to have known of it?

The question of contributory negligence is the real question in the case, says the lower court. They concede that some of the jury's findings are upon our side of the question. This is another way of saying that a good deal of testimony supports us for the jury assuredly favored this defendant in nothing. Nothing can be plainer than that it was safer to strain the wire from the street and the qualification added by the witness Alexander, and referred to by the lower court as the probable basis of a qualification by the jury, that he could not *complete* the work there is superfluous. Let him do the more dangerous work below and then mount the car and box to complete it by making the fastenings. There is no dispute at all that to pull from the top of the box was downright perilous.

As to Dixon's being at work out of the scope of his employment, that, we think, will not seriously be urged after the statement of this part of the case already made by us.

The complaint alleged (p. 3) that Dixon had been specially ordered to this particular repair. This is overwhelmingly disproved out of his own mouth. (p. 44) Nor can it be said that, even though he went of his own suggestion, he was still out of his duties. That, as we have said, the record clearly disproves. He had been doing work outside the barn for several months.

The doctrine of law is that a servant assumes the risks only of his employment, and that when he is called out of

that employment to do something else he does not assume the additional risks. This doctrine is meant to give protection to servants who, of a sudden, are summoned to some new or temporary service, to lend a hand for a time at another machine, or to take another's place during a brief absence. Even then the doctrine is by many courts not favored when, as here, the additional service is not shown to be more hazardous than the regular service, or when the servant understands it just as well. However, apply the doctrine here favorably to Dixon. Can he come within it? It certainly cannot be meant to cover cases where the servant, perfectly competent to do so, performs the additional services, whether frequently or infrequently, during from two to four months by his own admission, without objection, under a general order. No court ever has gone to such an extent as that. Why? Because it would not be just. Because it would be nearly impossible to extend a servant's regular duties.

The longer this case is examined the more clear will it be that, if Dixon had received only a slight injury by this accident, such as a broken limb, no court would have held his employer liable for that obscure defect, occasioned so long before, the wire in safe use for more than a year before the accident, the servant an electrician by his own complaint and admittedly taking the place of highest and of needless exposure in the performance of the work.

The State Supreme Court says the evidence was conflicting. Does it mean it was conflicting as to contributory negligence? We do not think it was. Five experienced men swore that the dangerous part of the work could be done from the street. The State Supreme Court would offset this with (p.) the remark of one witness that it was not safe anywhere. But does not our own common sense

say that it is infinitely less dangerous, if one is to be knocked down in any event, to receive the blow on the street rather than eighteen feet in the air on the top of an unsecured box? One other defense of its view is offered by the lower court (p. 118), the remark of one witness, Burroughs, that it was not the usual thing to pull from the street. But why should the servant not impose care on himself? Besides, why should Burroughs' casual remark outweigh the five other witnesses? The preponderance, aided by our common sense is too great. The State Supreme Court had itself previously decided that *some* testimony is not to outweigh the obvious preponderance. *Guley & Northwestern Car Co.*, 7 *Wash., St. 491.*

On the whole case the opinion of the lower court is all the more to be complained of, because since the opinion here they have, without even referring to this, decided the other way in a case strikingly similar. *Anderson vs. Inland Telephone Co.*, 53 *Pacific Rep. 657.*

The judgment of the lower court should be reversed.

Respectfully,

FREDERICK BAUSMAN,

Counsel for Plaintiff in Error.

No. 197.
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OCTOBER TERM, 1898.

No. 197.

FREDERICK BAUSMAN, as Receiver of the Rainier Power and Railway Company, Plaintiff in Error,

vs.

SAMUEL DIXON.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 197.

FREDERICK BAUSMAN, AS RECEIVER OF THE RAINIER POWER AND RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL DIXON.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

THE JURISDICTION OF THIS COURT.

While our original brief has perhaps fully covered the principles on which the writ of error here should be sustained, the very recent decision of this court in *Capital National Bank of Lincoln vs. First National Bank* (No. 72 of this term), decided so recently as not to have been seen by us before our departure for Washington city, suggests further comment.

That case, we think, can be clearly distinguished from this. There the receiver (of a national bank) was sued, not on anything affecting his existence, but by one who claimed

that something not belonging to the assets of the defunct bank had become intermingled with the assets that had passed into his hands. That he, the receiver, had, in his official capacity, committed a wrong for which he was officially liable, and which would tend to encumber or destroy him, was never maintained. This the Chief Justice was in his opinion careful to note. "The decision" [of the State court], says he, on page 4 of the Record copy, "did not purport to affect the assets of the bank * * * or in any way interfere with the disposition of assets actually belonging to the bank ——— *nor did it affect the receiver as receiver.*" × × × .

Now this clearly emphasizes what we have contended for in the present case. Here the whole charge is that the receiver, *as* receiver, is liable. In the discharge of his official duties he is alleged to have committed a wrong; to have been guilty of a tort which everything in his hands is liable to satisfy as a preferred charge. It is a suit that tends to annihilate the officer. He is not defending here as the successor in interest of the company, but as himself the wrongdoer, an officer of the United States courts. Denying that he has done wrong as such an officer, he sets up the due execution of his official functions, and this constitutes a *right* specially claimed under a Federal authority and within the meaning of the 25th section of the judiciary act.

It will be noticed also that the receiver in the bank case did not, apparently, put the lower court in a position to pass upon the Federal question of his existence, if that could in such a case be called in question at all. He did not move for a decree in his favor. Here the receiver moved that verdicts be directed for him, the defendant, thus calling for

a decision by the lower court as to whether the Federal officer was, as a proposition of law under all the facts, guilty of the tort.

As the plaintiff in this case claims to have been a Federal employé himself, the receiver's servant, and as the receiver defends as a Federal officer, that class of cases should be borne in mind where jurisdiction results here, because both parties claim under Federal authority.

One thing more. It was suggested from the bench during argument that the removal act of 1875, through which, for the first time in a century, Federal officers got the right of removal from State courts to the Federal circuit courts, might be an admission that the original act of 1789 was defective in its 25th section; that it had perhaps been discovered that the latter section had not given Federal officers writs of error from the highest State courts in every kind of instance, and that the removal to the circuit courts was then bestowed by way of remedy. To this we respectfully offer three replies: First, no decision of any court that we know of had at that time suggested that the 25th section needed any such supplement, so far as Federal officers were concerned; second, Federal officers were in no way referred to in it, and the only way that Federal officers availed themselves of that removal act at all was under "questions arising under the laws of the United States;" third, the supplement, if such it were intended to be, was clearly inadequate, since it still left Federal officers at the mercy of State courts in the present class of cases if the amount involved were under two thousand dollars.

Our own opinion is that the act of 1875 was merely cumulative, and for a good purpose cumulative. The Federal mar-

shal or other officer should have the right, if he so desired, to seek the courts of his own Government more speedily than under writ of error to the highest State court. But his rights to the latter remained. Those rights had been bestowed long before removal had been allowed to an officer. We cannot believe that the sagacious Ellsworth ever intended, when he withheld the right of removal from Federal officers, that in any class of cases whatever they should be both without removal and without appeal to the courts of the Government that created them.

Respectfully submitted.

FREDERICK BAUSMAN,

Counsel for Plaintiff in Error.

No. 197.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 197.

FREDERICK BAUSMAN, as Receiver of the RAINIER POWER AND RAILWAY COMPANY,	*Plaintiff in Error,*	No. 16725
vs.		
SAMUEL DIXON,	*Defendant in Error.*	

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF DEFENDANT IN ERROR

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 197.

FREDERICK BAUSMAN, as Receiver of the RAINIER POWER AND RAILWAY COMPANY, *Plaintiff in Error,* vs. SAMUEL DIXON, *Defendant in Error.*	No. 16,725

BRIEF OF DEFENDANT IN ERROR.

POINTS, ARGUMENT AND AUTHORITIES.

This is an action by the defendant in error against the plaintiff in error for damages for injury sustained by the negligence of the plaintiff in error.

For complaint see printed record, pages 1 to 4.

The answer is a denial of the different paragraphs of the complaint, and an affirmative defense alleging contributory negligence.

Printed record, pages 5 to 7.

The reply is a denial of the affirmative defense.

Printed record, page 8.

The action was tried by a jury, and verdict rendered in favor of the defendant in error for ten thousand dollars ($10,000.00).

Printed record, page 16.

There was also propounded to the jury certain interrogatories embracing questions of fact to be passed on, which questions of fact were answered by the jury and returned with its verdict.

Printed record, pages 16 to 21.

Motion for a new trial served and filed.

Printed record, pages 21 and 22.

The motion for a new trial was overruled and judgment entered upon the verdict of the jury.

Printed record, page 22.

Notice of appeal, and appeal bond served and filed.

Printed record, pages 23 and 24.

The Supreme Court of the State of Washington passed upon the questions assigned as error, and rendered its opinion.

Printed record, pages 116 to 119.

The only questions passed upon, were the questions of fact as to whether the evidence was sufficient to justify the verdict. The court affirmed the judgment upon the ground that the verdict of the jury was sustained by sufficient evidence. No other questions were presented or decided.

The writ of error was sued out, and the cause transferred to this court.

Printed record, pages 119 to 124.

The assignment of error presents no federal question to be passed upon by this Honorable Court.

Printed record, pages 122 to 124.

MOTION TO DISMISS.

The defendant in error served and filed his motion to dismiss the writ of error, for the reason that this court has no jurisdiction of the cause, because no federal question is presented for decision by the record. There is nothing in the record, in this cause, that will give this court jurisdiction.

Section 709 of the Revised Statutes of the United States.
Desty's Federal Procedure, 8th Ed., Vol. 1, Sec. 223.

There is nothing in the opinion in this cause, printed record pages 116 to 119, *supra*, to give the court any jurisdiction under the statute above mentioned.

This court is wholly without jurisdiction and the motion should be granted and the writ of error dismissed.

In the case of *Fowler et al. v. Lamson et al., 164 U. S., 252 (17 Supreme Court Reporter, 112)*, this court by Peckham, Justice, says:

"It has also been frequently decided that, to give this court jurisdiction on writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was neces-

sary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment as rendered could not have been given without deciding it."

The authorities supporting this decision are numerous; it is only necessary to refer this court to—

Louisville & N. R. Co. v. City of Louisville, 166 U. S., 709 (17 Supreme Court Reporter, 725).

Leyson v. Davis et al., 18 Supreme Court Reporter, 500.

Missouri, K. & T. Ry. Co. v. Haber et al., 18 Supreme Court Reporter, 488.

In *Volume 2 of Encyclopædia of Pleading and Practice, page 38*, the rule is laid down thus:

"A federal question exists when a party claims a right, title, interest or immunity under the constitution, or a treaty or statute of the United States. The record must show that the question was properly raised and actually decided below, or the court must be able to reasonably infer from the record that the decision of such question was necessarily involved in the judgment rendered. The determination of the question must have been adverse to the plaintiff in error. These requisites are jurisdictional, and where the judgment can be supported on grounds independent of the federal question the appeal will be dismissed."

The above doctrine is supported by a long line of decisions by this court, to which we call attention.

Under the rule laid down and the long line of decisions supporting it there is no way for the plaintiff in error to sustain its writ of error in this court, as the court is wholly without jurisdiction to pass upon the case. If the plaintiff in error can sustain its position in this court, then all cases where questions of fact are involved may be moved from the state supreme

court, on writ of error, to this court, which is contrary to the statute, section 709, *supra*, and to a long line of decisions by this court.

QUESTIONS OF FACT.

This court will not review questions of fact passed upon by a jury and sustained by the Supreme Court of the State.

In the case of *Noble et al. v. Mitchell, 164 U. S., 367* (*17 Supreme Court Reporter, 110*), this court says:

"This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error."

The Supreme Court of the State of Washington in its opinion in this case, printed record, pages 116 to 119, was unanimous in sustaining the verdict of the jury, and under the rule laid down by this court, this court will not review the decision of the Supreme Court of Washington upon this point.

The rule is fully discussed and sustained in the case of *Dower v. Richards, 151 U. S., 658.*

In the case of *Dower v. Richards, supra*, the court says:

"No point has been more repeatedly and authoritatively settled than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record."

In the same case the court says:

"And if the decision of the state court rests on an independent ground of law, not involving any federal question, this

court has no jurisdiction. The reasons against its jurisdiction are as strong, if not stronger, when the decision of the state court proceeds upon matter of fact only."

As the only matter passed upon by the state court was a question of fact, as shown by the opinion of the state court, this court is wholly without jurisdiction to change the decision.

Missouri v. Andriano, 138 U. S., 496.

New Orleans Water Company v. Louisiana Sugar Refining Company. 125 U. S., 18.

Eustis v. Bolles, 150 U. S., 361.

California Powder Works v. Davis, 14 Supreme Court Reporter, 350.

In re Buchanan, 158 U. S., 31.

TESTIMONY.

It is only necessary to examine the testimony set out in the printed record, on pages 27 to 116, to see that every finding of the jury is justified by the testimony. In fact the verdict of the jury was supported by the testimony, and in addition to the general verdict the special findings of the jury on pages 16 to 21, printed record, show that the jury passed upon every point, and while we do not believe, under the authorities above referred to and the practice of this court, that this court will attempt to pass upon the testimony, yet should the court decide that it had jurisdiction to do so, we then contend that there is no error in the decision of the Supreme Court of the State of Washington, as the verdict of the jury was sustained by sufficient evidence.

FIRST.

We ask that the writ of error be dismissed because there is no federal question involved in the record.

SECOND.

We ask that the writ of error be dismissed because nothing but a question of fact was raised, or presented or passed upon, by the Supreme Court of the State of Washington.

THIRD.

In case the above motion be overruled we ask that judgment be affirmed, on the ground that the testimony *does* sustain the verdict of the jury.

Wherefore, defendant in error asks that the judgment be, in all things, affirmed.

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BAUSMAN *v.* DIXON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 197. Argued and submitted January 25, 1899. — Decided February 20, 1899.

A receiver of a railroad in a State, appointed by a Circuit Court of the United States, is not authorized by the fact of such appointment to bring here for review a judgment in a court of the State against him, when no other cause exists to give this court jurisdiction.

THE case is stated in the opinion.

Mr. Frederick Bausman for plaintiff in error.

Mr. John E. Humphries and *Mr. Edward P. Edsen* for defendant in error submitted on their brief, on which were also *Mr. William E. Humphrey*, *Mr. Harrison Bostwick* and *Mr. C. E. Remsberg*.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Dixon brought an action in the Superior Court of King County, Washington, against Bausman, receiver of the Ranier Power and Railway Company, to recover damages for injuries sustained by reason of defendant's negligence. The complaint alleged that the Ranier Power and Railway Company was a corporation organized under the laws of Washington, and engaged in operating a certain street railway in the city of Seattle; that June 13, 1893, one Backus was duly appointed by the Circuit Court of the United States for the District of Washington, receiver of the company, and qualified and served

as such until February 11, 1895, when he was succeeded by Bausman; and that the injury of which plaintiff complained was inflicted in the course of the operation of the railway, on June 15, 1893. The answer denied that Bausman's predecessor in office had employed Dixon; and that Dixon's injuries were caused by negligence; and set up contributory negligence as an affirmative defence. The action was tried by a jury and a verdict rendered in favor of Dixon, the jury also returning answers to certain questions of fact specially propounded. A motion for new trial was overruled and judgment entered on the verdict, and the cause was carried to the Supreme Court of Washington, which affirmed the judgment, (17 Washington, 304,) whereupon this writ of error was allowed.

We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that because of his appointment as receiver the judgment against him amounts to a denial of the validity of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state Supreme Court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a Federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order.

We have just held in *Capital National Bank of Lincoln* v. *The First National Bank of Cadiz*, 172 U. S. 425, that where

the receiver of a national bank was a party defendant in the state courts, contested the issues on a general denial, and set up no claim of a right under Federal statutes withdrawing the case from the application of general law, this court had no jurisdiction to revise the judgment of the highest court of the State resting thereon; and, certainly, an officer of the Circuit Court stands on no higher ground than an officer of the United States.

Defendant did not deny that he was amenable to suit in the state courts; he did not claim immunity as receiver from suit without previous leave of the Circuit Court, and could not have done so in view of the act of March 3, 1887, c. 373, 24 Stat. 552; all the questions involved were questions of general law, including the inquiry whether one person holding the office of receiver could be held responsible for the acts of his predecessor in the same office; and the judgment specifically prescribed that the "said amount and judgment is payable out of the funds held by said Bausman, as receiver of said company, which come into the hands of said receiver and are held by him as receiver, and funds belonging to the receivership which are applicable for that purpose which may hereafter come into the receiver's hands, or under direction of the court appointing such receiver."

Section three of the act of March 3, 1887, provides that: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." It is not denied that this action was prosecuted and this judgment rendered in accordance therewith.

The writ of error is

Dismissed.